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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

WILLIAM F. GLOVER,
Petitioner,

vs.

MCDONNELL DOUGLAS CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals misinterpreted and misapplied the legal standard for an award of liquidated damages under the Age Discrimination in Employment Act as set forth in *Hazen Paper Co. v. Biggins*, 113 S.Ct. 1701 (1993)?

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OPINION BELOW

The Opinion of the Eighth Circuit Court of Appeals, rendered on January 7, 1994, is officially reported at 12 F.3d 845 (8th Cir. 1994). A copy of the Opinion is reproduced in the Appendix to this Petition.

JURISDICTIONAL STATEMENT

The Judgment of the Eighth Circuit Court of Appeals was entered on January 7, 1994. Plaintiff Glover filed a petition for rehearing by the panel or, alternatively, for rehearing en banc. The Court of Appeals denied the petition on February 18, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

STATUTE INVOLVED

The liquidated damages provision of the Age Discrimination in Employment Act provides as follows:

> Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: Provided, That liquidated damages shall be payable only in cases of willful violations of this chapter.

See 29 U.S.C. §626(b).

STATEMENT OF THE CASE

The Petitioner, plaintiff William Glover, worked in the Accounting Department of the Respondent, defendant McDonnell Douglas Corporation. Several years ago, the company consolidated three of its subsidiaries. As a result of the consolidation, jobs were eliminated. Joseph Barbeau, the company manager in charge of the newly consolidated Accounting Department, was told to select three people in his department for termination. He selected three employees, all of them over the age of 40. One of them was Mr. Glover. At the time, Mr. Glover was 59 years of age. He was the oldest employee in the Accounts Payable Section of the Accounting Department and the one with the most seniority, over 20 years.

Mr. Barbeau was free to select any three employees in the Accounting Department for termination. However, job performance and years of service were supposed to be key factors in determining who would stay and who would go. Armed with these criteria, Mr. Barbeau proceeded to do some very strange things. He selected Mr. Glover for termination and saved several younger employees in the department who had less ability and less seniority than Mr. Glover.

Mr. Glover's job performance with the company was competent and satisfactory. He had never been disciplined or told his job was in jeopardy. On the contrary, he had been told repeatedly that his job performance was "good." Indeed, his performance evaluations in the four years preceding his termination were positive. Moreover, he had over 20 years of seniority with the company. Nevertheless, he was let go in favor of much younger co-workers in the Accounting Department who were less qualified and had less seniority. In particular, he was selected over one co-worker, 23 years old, who had been employed with the company less than 3 years; a second co-worker, 31 years old, who had less than 1 year experience as a regular full time employee; a third co-worker, 33 years old, who had less than 1 year of experience with the company; and a fourth co-worker, 24 years old, who had less than 2 years of experience with the company. Significantly, the 24 year old employee was a poor performer; according to Mr. Barbeau she was a "recent disappointment." This employee, unlike Mr. Glover, received sharply negative job evaluations which documented numerous deficiencies in her job performance. Moreover, the 33 year old employee ranked *below* Mr. Glover on the company's "totem pole" which listed employees in order of their job performance and value to the company. Merit and seniority were supposed to determine who did, and who did not, survive the reduction in force. The fact that Mr. Barbeau departed from these criteria in selecting Mr. Glover for termination constituted compelling circumstantial evidence of age discrimination.

There was also direct evidence of intentional age discrimination. Mr. Barbeau's handwritten notes show that he went out of his way to record the ages of many of the employees he was considering for termination. According to Mr. Barbeau, he did this because his superiors needed the information to review the lawfulness of his decisions. However, there was no evidence that Mr. Barbeau's superiors asked him to record the ages of employees or that they in any way used the information he

recorded to evaluate the lawfulness of his decisions. Thus, it was a reasonable inference that Mr. Barbeau recorded the information for the illegitimate purpose of facilitating discrimination on the basis of age. Moreover, it is important to note that Mr. Barbeau's handwritten notes reflect the notation "young, more potential" next to the name of Laura Pund, age 27, who was saved from termination. This age-related comment was direct evidence of Mr. Barbeau's preoccupation with age. It showed that he wanted to retain younger employees, like Ms. Pund, rather than older employees, like Mr. Glover, because the younger employees had a longer future with the company.

Mr. Barbeau knew it was wrong under the law to fire Mr. Glover on account of his age, 59. Indeed, he was briefed on the prohibitions of the Age Discrimination in Employment Act (ADEA) shortly before he selected Mr. Glover for termination in the reduction in force. He was specifically told it was unlawful to fire an employee because of his age. In addition, his handwritten notes showed a sophisticated understanding of the statute. For example, his notes distinguished between "disparate treatment" and "disparate impact" cases under the ADEA.

Plaintiff Glover filed this lawsuit alleging that he was the victim of age discrimination in violation of the ADEA. After hearing four days of testimony, the jury agreed with Mr. Glover and awarded him $30,000 in back pay. The jury found the violation to be "willful" so Mr. Glover was awarded $30,000 in additional liquidated damages under the ADEA. On appeal, the Eighth Circuit Court of Appeals affirmed the jury's finding of intentional age discrimination. The Court noted that Mr. Glover produced direct, as well as circumstantial, proof of age discrimination by McDonnell Douglas. Accordingly, it affirmed the award of $30,000 in back pay. *See Glover v. McDonnell Douglas Corp.*, 981 F.2d 388, 392-393 (8th Cir. 1992).

At the same time, however, the Court of Appeals reversed the award of $30,000 in liquidated damages under the ADEA.

According to the Court, there was insufficient evidence, as a matter of law, to show that McDonnell Douglas possessed the requisite culpable state of mind to justify the award against it. The Court was not impressed with the evidence showing that Mr. Barbeau knew his conduct was unlawful. According to the Court, "additional evidence" was needed to justify the award. The Court concluded there was no such "additional evidence" in this case. *See Glover, supra*, 981 F.2d at 395-396.

Several months later, the U.S. Supreme Court decided *Hazen Paper Co. v. Biggins*, 113 S.Ct. 1701 (1993). In *Hazen Paper Co.*, the Supreme Court overruled Eighth Circuit caselaw on liquidated damages. The Court held that when an employer does what it knows the ADEA prohibits liquidated damages can be awarded against it. *Id.* at 1708-1710. Significantly, the Court rejected the notion, endorsed by the Eighth Circuit, that "additional evidence" is needed to justify such an award. *Id.* at 1709. After *Hazen Paper Co.* was decided, Mr. Glover filed a petition for a writ of certiorari with the Supreme Court. The Supreme Court vacated the judgment of the Eighth Circuit and remanded the case for further consideration in light of *Hazen Paper Co.* 114 S.Ct. 42 (Oct. 4, 1993).

On remand, the Eighth Circuit refused to alter its prior decision. Once again, the Court concluded that McDonnell Douglas was guilty of "intentional" age discrimination but not "willful" age discrimination. *See* Appendix at A5-A7. Mr. Glover filed this timely petition for a writ of certiorari challenging the Eighth Circuit's ruling.

REASONS FOR GRANTING THE PETITION FOR CERTIORARI

The ADEA distinguishes between "intentional" and "willful" violations of the statute. A violation is "intentional" if the employer deliberately treats an older employee adversely on account of his age; a violation is "willful" if, in addition to deliberately treating the older employee adversely on account of his age, the employer knows, or acts in reckless disregard of the fact, that it is unlawful to treat the employee adversely on account of his age. *Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111, 125-129 (1985). In this case, the Eighth Circuit affirmed the jury's finding that McDonnell Douglas was guilty of "intentional" age discrimination against Mr. Glover. The culpable decisionmaker, Mr. Barbeau, selected Mr. Glover for termination during a reduction in force on account of his age, 59. At the same time, however, the Eighth Circuit reversed the jury's finding that the age discrimination was "willful" and vacated the award of liquidated damages in Mr. Glover's favor. According to the Eighth Circuit, Mr. Barbeau did not know it was wrong under the law to terminate Mr. Glover because of his age even though he was specifically told by his superiors, shortly before he made the challenged decision, that it was wrong under the law to terminate an employee because of his age. The Eighth Circuit reached this astonishing conclusion by ignoring relevant caselaw from other Circuits and by misinterpreting and misapplying two U.S. Supreme Court decisions.

The Eighth Circuit acknowledged that Mr. Barbeau was briefed on the prohibitions of the ADEA shortly before he selected Mr. Glover, along with two other employees, for termination in the reduction in force. On cross-examination, Mr. Barbeau testified:

> Q. Did anyone ever tell you, sir, that you were not supposed to discriminate against people because of

age? And by people I mean the employees of McDonnell Douglas, including Mr. Glover?

A. *See, we were told that age could not be a consideration in termination.*

Q. Okay. And you were told that by the lawyers, is that right?

A. Yes, sir.

Q. And by the human resources people?

A. Yes, sir.

(Tr. II at 128-130, 172) (emphasis added). Nevertheless, the Eighth Circuit did not think this testimony was sufficient to show that Mr. Barbeau knew it was wrong under the ADEA to terminate Mr. Glover on account of his age:

> It is contended that, because Barbeau had been briefed about the basic requirements and prohibitions of the ADEA, and because Barbeau had been found to violate the ADEA, he must have committed his violation recklessly. However, *Thurston* itself rejected this argument when it declined to hold "that a violation of the Act is 'willful' if the employer simply knew of the potential applicability of the ADEA." 469 U.S. at 127.

See Appendix at A6-A7. The Eighth Circuit's analysis cannot be justified. Mr. Barbeau's testimony did not show he knew the ADEA was "potentially" applicable to his conduct; it showed he knew the ADEA was *in fact* applicable to his conduct. His handwritten notes, generated in connection with the reduction in force, confirm this reality. They contain such comments as "Disparate treatment - age a factor" and "Disparate impact - after the fact," and "Age 50-55 principal area of concern" (Exhibit 67). These comments showed a sophisticated understanding of the prohibitions of the ADEA. Mr. Barbeau could not have

written them unless he knew, after being briefed about the statute, that it was unlawful to terminate older employees, such as Mr. Glover, because of their age.

This is not a case, therefore, in which the decisionmaker merely knows the ADEA exists — that it is "in the picture" — without knowing, or strongly suspecting, that his conduct is actually forbidden by the statute. Doubtless such cases are rare. Rather, this is the more common case in which the decisionmaker actually knew, or strongly suspected, that his conduct violated the ADEA. Mr. Barbeau was specifically told it was unlawful to terminate an employee, such as Mr. Glover, in the reduction in force because of the employee's age. Nevertheless, he went ahead and did it anyway. This is precisely the kind of willful misconduct, with a consciousness of wrongdoing, which justifies an award of liquidated damages under the ADEA.[1]

Federal appellate courts in other jurisdictions agree. They have often upheld jury findings of willfulness based on the decisionmaker's testimony, usually elicited on cross-examina-

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[1] McDonnell Douglas cannot argue, without blushing, that Mr. Barbeau did not know it was unlawful to fire Mr. Glover because of his age. In fact, it has never made such an argument. Instead, it argued that the members of its "Review Committee," which approved Mr. Barbeau's decision to terminate Mr. Glover, acted in good faith without any willful age discrimination. According to McDonnell Douglas, the Committee's good faith insulated it from an award of liquidated damages. However, the Committee's review of Mr. Barbeau's decision was entirely perfunctory; it merely rubberstamped his decision (Tr. II at 134). Moreover, there is not a particle of evidence in the record that the Committee ever reviewed Mr. Barbeau's decision to terminate Mr. Glover for the specific purpose of determining whether it was age-based (Tr. II at 173). Had it done so, the Committee would have discovered, as the jury did, that it was the product of age discrimination. McDonnell Douglas is legally responsible for the willful misconduct of Mr. Barbeau, its managerial employee, in this case. *Am. Soc. of Mech. Engr's v. Hydrolevel Corp.*, 102 S.Ct. 1935, 1947 and n. 14 (1982); *Kientzy v. McDonnell Douglas Corp.*, 990 F.2d 1051, 1056-1057 (8th Cir. 1993).

tion, that he knew the ADEA proscribed the conduct he is accused of committing. The First and Eleventh Circuits are exemplars of this approach. The First Circuit has held:

> The principal owner of the company, Thomas Hazen, testified that he was "absolutely" aware that age discrimination was illegal. This is as strong evidence of a knowing violation of the ADEA as a plaintiff could wish.

Biggins v. Hazen Paper Co., 953 F.2d 1405, 1415 (1st Cir. 1992), *vacated on other grounds*, 113 S.Ct. 1701 (1993). Similarly, the Eleventh Circuit has held:

> Applying the *Thurston* standard for liquidated damages to the jury's fact findings, we hold Lindsey is entitled to liquidated damages. The jury found that ACIPCO intentionally discriminated against Lindsey because of his age and that its "legitimate" reasons for its decision were merely pretext for the discrimination. In addition, the defendant admitted at trial that it knew the ADEA prohibited consideration of an employee's age in making employment decisions. Joseph P. Doughty Jr., who was, at the time of the employment decision, Assistant Treasurer and Controller of ACIPCO, testified on cross-examination:
>
> Q: You were aware, were you not, at the time the decision was being made that it was discriminatory to consider someone's age in making a decision, weren't you?
>
> A: Yes.
>
> Q: And you knew about this Act that said you couldn't do that, didn't you?
>
> A: Yes. I'm aware of that.
>
> Together these facts satisfy the strictest prong of the *Thurston* willfulness standard: the employer *knew* that its conduct violated the ADEA. Thus, no danger exists in this case of

> imposing liquidated damages upon an employer who made a good faith effort to comply with the ADEA.

Lindsey v. American Cast Iron Pipe Co., 810 F.2d 1094, 1099 and n. 5 (11th Cir. 1987) (emphasis in the original); *see also Formby v. Farmers and Merchants Bank*, 904 F.2d 627, 632 (11th Cir. 1990).

It is not hard to figure out why the Eighth Circuit shunned the common sense approach taken by the First and Eleventh Circuits. The Eighth Circuit was worried that it is all too easy, in a garden-variety discharge case, for the plaintiff to show that the decisionmaker knew it was wrong under the ADEA to fire the plaintiff because of his age. A literal application of the *Thurston* standard of willfulness in such cases would lead to an almost automatic award of liquidated damages. "It must be remembered," the Eighth Circuit emphasized, "that Congress aimed to create a two-tiered liability scheme under which some but not all ADEA violations would give rise to liquidated damages." *See* Appendix at A7. For this proposition, the Eighth Circuit cited the U.S. Supreme Court's recent decision in *Hazen Paper Co. v. Biggins*, 113 S.Ct. 1701, 1708 (1993).

But *Hazen Paper Co.* does not support the Eighth Circuit's decision. On the contrary, it undermines it. Prior to *Hazen Paper Co.*, many of the federal courts of appeal, including the Eighth Circuit, did all they could to avoid applying the plain language of the *Thurston* standard. It was not enough, they thought, for the plaintiff to show that the decisionmaker knew, or strongly suspected, that it was wrong under the ADEA to fire the plaintiff on account of his age. That was too easy. "Additional evidence" was needed. *Bethea v. Levi Strauss & Co.*, 827 F.2d 355, 359 (8th Cir. 1987). The "additional evidence" might be direct, as opposed to circumstantial, evidence of age bias, *Neufeld v. Searle Laboratories*, 884 F.2d 335, 340 (8th Cir. 1989), or evidence that age was the predominant, rather than simply a

determinative factor, in the challenged decision, *Spulak v. K Mart Corp.*, 894 F.2d 1150, 1159 (10th Cir. 1990), or evidence that the employer's conduct was "outrageous." *Bethea, supra,* 827 F.2d at 359. These requirements were added to the *Thurston* standard in order to keep plaintiffs who prove intentional age discrimination from routinely recovering liquidated damages in ADEA cases. This result must be avoided at all costs, these courts thought, because it was inconsistent with the "two-tiered liability scheme" envisioned by Congress.

Their reasoning, however, runs headlong into *Hazen Paper Co.* In that case, the Supreme Court reaffirmed the *Thurston* standard of willfulness as originally formulated. Evidence that the employer's decisionmaker knew, or at least strongly suspected, that his conduct was prohibited by the ADEA is sufficient, without more, to justify an award of liquidated damages:

> It would be a wholly circular and self-defeating interpretation of the ADEA to hold that, in cases where an employer more likely knows its conduct to be illegal, knowledge alone does not suffice for liquidated damages.

113 S.Ct. at 1710. The Court expressed "surprise" that several federal appellate courts, including the Eighth Circuit, misinterpreted the simple *Thurston* standard by engrafting additional requirements onto it. *Id.* at 1709. Significantly, the Court found their concern for maintaining a two-tiered liability scheme to be "misplaced:"

> The ADEA does not provide for liquidated damages where consistent with the principle of a two-tiered liability scheme. It provides for liquidated damages where the violation was willful.

Id. The Court noted that, while the *Thurston* standard might lead to an award of liquidated damages in most ADEA cases, it would not lead to an award of liquidated damages in all ADEA cases. In a narrow range of cases, liquidated damages would be denied:

> It is not true that an employer who knowingly relies on age in reaching its decision invariably commits a knowing or reckless violation of the ADEA. The ADEA is not an unqualified prohibition on the use of age in employment decisions, but affords the employer a "bona fide occupational qualification" defense, . . . and exempts certain subject matters and persons . . . . [In addition], if an employer incorrectly but in good faith and nonrecklessly believes that the statute permits a particular age-based decision, then liquidated damages should not be imposed.

Id. McDonnell Douglas has not invoked the BFOQ defense or any of the statutory exemptions from coverage under the ADEA to shield itself from liquidated damages in this case. Moreover, it has never suggested that if Mr. Barbeau discriminated against Mr. Glover he did so in the good faith belief that the ADEA permitted such discrimination. *Cf. Whitfield v. City of Knoxville*, 756 F.2d 455, 463-464 (6th Cir. 1985). Such a suggestion would be utterly untenable on the facts of this case. Accordingly, there was no basis under *Hazen Paper Co.* for the Eighth Circuit to vacate the jury award of liquidated damages in Mr. Glover's favor.

In short, the Eighth Circuit misinterpreted and misapplied the *Thurston* standard of willfulness. Although *Hazen Paper Co.* dramatically relaxed the legal requirements for an award of liquidated damages which previously prevailed in the Eighth Circuit, the Court of Appeals refused to acknowledge this reality. Instead, it behaved as if *Hazen Paper Co.* had never been decided. The Court did not make it easier for a victim of intentional age discrimination to recover liquidated damages, as the Supreme Court intended, but instead made it substantially more difficult. In fact, it made it impossible. Mr. Glover proved that Mr. Barbeau selected him for termination in the reduction in force because of his age. In addition, he proved that Mr. Barbeau knew it was unlawful to select him for termination because of his age but that he nevertheless went ahead and did it anyway. It is

hard to imagine, under these circumstances, what more Mr. Glover could have done to justify the jury award of liquidated damages in his favor. There is simply no way that Mr. Barbeau, after being told it was wrong under the law to fire an employee on account of his age, could have proceeded to fire Mr. Glover on account of his age without knowing it was wrong under the law to do so. This is not an esoteric point of law; it is elementary common sense. The Eighth Circuit tossed common sense aside, however, in its rush to preserve a "two-tiered liability scheme" in ADEA cases. Its concern for preserving such a scheme was, in the words of *Hazen Paper Co.*, "misplaced." 113 S.Ct. at 1709. The Supreme Court is not hostile, as the Eighth Circuit supposed, to an interpretation of the term "willful" which would result in an award of liquidated damages in most cases of intentional age discrimination. On the contrary, it has explained it is the natural consequence of the way Congress wrote the statute. *Id.*

The Eighth Circuit's decision squarely contradicts *Hazen Paper Co.* In addition, it squarely contradicts well-reasoned decisions from the First and Eleventh Circuits which, had they been applied in this case, would have yielded a different result. The Supreme Court must act now to remove the conflict between the Circuits over the proper interpretation of the liquidated damages provision of the ADEA. It must restore logic and coherence to the law by giving effect to *Hazen Paper Co.* As things stand now, the Eighth Circuit has made it impossible for victims of "intentional" age discrimination to prove "willful" age discrimination. This is intolerable; it thwarts the clear will of Congress. Because it cannot be justified, and sets a dangerous precedent at odds with the law in other Circuits, with *Hazen Paper Co.* and with the statutory scheme enacted by Congress, the Eighth Circuit's decision must be reconsidered and set aside as invalid.

CONCLUSION

For the reasons discussed, Mr. Glover asks the Supreme Court to grant his petition for certiorari.

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-1059EM

William F. Glover,
Plaintiff-Appellee,

v.

McDonnell Douglas Corp.,
Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri.

Submitted: December 10, 1993

Filed: January 7, 1994

Before BEAM, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and MORRIS SHEPPARD ARNOLD, Circuit Judge.

FLOYD R. GIBSON, Senior Circuit Judge.

On October 4, 1993, the United States Supreme Court vacated our previous decision in this case (reported at 981 F.2d 388 (1992)) and remanded for reconsideration in light of *Hazen Paper Co. v. Biggins*, 113 S.Ct. 1701 (1993). On reconsideration, we affirm in part and reverse in part.

I. BACKGROUND

Rather than reformulate the facts of his case, we set forth below the background substantially as it was explained in our prior opinion.

A. The Layoff

In the middle of 1987, McDonnell Douglas responded to declining business by consolidating its Astronautics, Electronics, and Microelectronics subsidiaries. The company determined that, as a result of the consolidation, approximately 120 jobs would have to be eliminated. Most of these jobs were eliminated when McDonnell Douglas instituted a voluntary severance program, but the program fell short of its goal, resulting in the need to lay off nineteen individuals.

Joseph Barbeau, the person in charge of the newly consolidated accounting department, was told that he had to select three people to be laid off. In February 1988 Barbeau selected the three employees, including Glover. Glover was fifty-nine years old and had worked for the Astronautics subsidiary for over twenty years. Glover had a BA degree and an associates degree but did not have a degree in accounting. His job was that of a "processor" in the Accounts Payable Section; his duties consisted primarily of reviewing invoices to insure they complied with the company's purchase orders. Glover sued McDonnell Douglas, alleging he had been selected for termination based on his age and was denied consideration for reassignment to another subsidiary based on his age.

B. The Trial

In outlining the evidence presented at trial, we find it more expedient to discuss McDonnell Douglas' evidence first. Barbeau testified that he began working for the Astronautics division in the summer of 1987. In the middle of January, 1988, Barbeau was told that three people would have to be laid off, but he was not told how to go about selecting those three people. He was permitted to chose any three employees, whether they were salaried or hourly, full-time or part-time. In making his determination, he relied on the company's "totem poles." The totem poles ranked employees, with the better performers and most

valuable employees being listed closer to the top. Totem poles were generated annually by each subsidiary and used as, among other things, a factor in awarding merit raise. In determining who was to be laid off, Barbeau obtained the totem poles for each newly consolidated subsidiary from 1985, 1986, and 1987. During these three years, all three subsidiaries utilized separate poles for salaried and non-salaried employees. On the Astronautics' subsidiary's totem pole for 1987, Glover ranked 42 out of 42 salaried employees; in 1986, he was ranked 39 out of 43; and in 1985, he ranked 30 out of 52. Barbeau testified that if salaried and hourly employees were combined on one totem pole, Glover would have ranked 57 out of 61 in 1987. From the totem poles, Barbeau created a list of employees that had consistently ranked near the bottom in the preceding three years. He then began acquiring other information about the employees by talking to other supervisors. Barbeau wrote some (but not all) of this information down; included in this information was the statement that one of the employees on his list was "young" and had "more potential." After conversing with the other supervisors, Barbeau created a preliminary list of approximately fifteen candidates for layoff and ranked the top six; Glover was ranked as the second candidate.

Barbeau then consolidated much of his previously collected information and added information reflecting each employee's age, years of service, and absentee record. On approximately January 18, he discussed the information with his staff, whereupon it was decided that Glover should be among those laid off. Barbeau prepared yet another, more detailed copy of his information and had two further discussions with representatives from McDonnell Douglas' legal and human relations departments. At these meetings, Barbeau was told that if all things were equal between two or more likely candidates, years of service could be considered (with greater seniority being rewarded). He was also given some basic information about the ADEA.

Glover testified that he inquired about moving to McDonnell Douglas' Aircraft subsidiary, and to that end spoke with Jim Cleeton. Glover testified that Cleeton told him he would not be considered because of his age. Cleeton testified and denied making that statement. Glover also testified about his experiences in finding another job, and that the combination of being laid off and the menial nature of his new job caused him to experience disruptive sleep habits, a diminished desire for food, and a degree of humiliation sufficient to prevent him from socializing as much as he had before being laid off. Also testifying on Glover's behalf were four other employees in accounts payable. All four were significantly younger than Glover, were hourly employees, and had less education and experience. One of these employees had received particularly critical job appraisals, and another ranked below Glover on the combined totem pole; no information was provided about the other employees' job performance or their positions on any totem poles. None of these employees was laid off in February of 1988. Because these processors were hourly employees, they did not appear on the same totem poles as Glover, who was a salaried employee.

The jury returned a verdict in Glover's favor and awarded him $30,000 in backpay, $100,000 in emotional distress damages, and $100,000 in punitive damages. The jury found the violation to be willful, and the district court accordingly awarded Glover an additional $30,000 in liquidated damages. The court also granted Glover equitable relief in the form of reinstatement and pension credit. McDonnell Douglas appeals.

II. DISCUSSION

A.

In its appeal, McDonnell Douglas raised issues relating to the proper standard of review on appeal (Part A of our prior opinion), the sufficiency of the evidence (Part B), the correctness of certain

jury instructions (Part C), the award of emotional damages under state law (Part D), the finding of a willful violation (Part E), the award of punitive damages under state law (Part F), and the granting of pension credit (Part G). Though the Supreme Court's order vacated our prior opinion as it related to all these issues, it remanded for reconsideration in light of *Hazen Paper*. This case is relevant to the case at bar only for its discussion of the standard to be used in determining whether a violation is willful. Though we are free to revisit all the issues in this case, we do not think it necessary to do so at any great length.[1]

With regard to the other issues, our decisions are the same as they were earlier. Specifically, we hold that the traditional standard of review should apply, and that though "[s]harply contrasting testimony was presented to the jury,... the jury chose to believe Glover [and] there is nothing in the record that demonstrates, as a matter of law, this decision was improper or unfounded." *Glover*, 981 F.2d at 393. We also hold that the jury instruction was properly based on the *Price-Waterhouse*[2] formulation for mixed-motive cases. We reverse the award of emotional distress damages awarded under Missouri law because there was no expert medical testimony offered to support Glover's claim as required by Missouri law. We reverse the punitive damage award under state law because there was "no evidence of evil motive or reckless indifference on McDonnell Douglas' part" as required by Missouri law. *Glover*, 981 F.2d at 396. Finally we vacate the award of pension credit because "the district court's order puts Glover in a better than whole position; he gets back pay, pension benefits as if he had not been termi-

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[1] Upon receiving notice of the remand, we entered an order granting the parties leave to file briefs, with the discussions "limited to the effect of *Hazen Paper Co.* on the award of liquidated damages, which constitutes Part E of our earlier opinion." Glover has filed a motion for leave to file a supplemental brief discussing Parts D and F of our prior opinion. That motion is denied.

[2] *Price-Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

nated, and the pension benefits he has already received." *Id.* at 397.[3]

B.

In *Hazen Paper*, the Supreme Court decided that the standard for willfulness enunciated in *Trans World Airlines. Inc. v. Thurston*, 469 U.S. 111 (1985) "applies to all disparate treatment cases under the ADEA," whether they be based on company policies or on individual or isolated employment decisions. 113 S. Ct. at 1710. This standard requires "that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." *Id.*

Having previously applied the *Thurston* standard in this case, *Glover*, 981 F.2d at 395-96, it is a relatively simple matter to do so again. We continue to believe that "[t]here is simply no evidence that McDonnell Douglas recklessly disregarded the possibility of an ADEA violation, and there is no contention that the company knew its actions were discriminatory." *Id.* at 396.[4] Therefore, there was insufficient evidence to sustain the jury's determination that the violation was willful, and liquidated damages should not be awarded.

It is contended that, because Barbeau had been briefed about the basic requirements and prohibitions of the ADEA, and because Barbeau had been found to violate the ADEA, he must have committed his violation recklessly. However, *Thurston* itself rejected this argument when it declined to hold "that a

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[3] Though it has been vacated and therefore lacks precedential value in future cases, the parties and the district court are invited to rely on our prior opinion as it relates to these issues (all but part E) for purposes of resolving matters on remand.

[4] This result was foreshadowed by our earlier discussion of *Hazen Paper*, which had not yet been decided. We stated that "our decision today will be unaffected; if *Thurston* continues to apply, the law — and our decision — will be unchanged." *Glover*, 981 F.2d 396 n.2.

violation of the Act is 'willful' if the employer simply knew of the potential applicability of the ADEA." 469 U.S. at 127.

Our earlier thoughts on this matter were not incorrect simply because our opinion was later described as holding that the "liquidated damages award must be supported by evidence beyond the minimum necessary to prove the violation," *Brown v. Stites Concrete. Inc.*, 994 F.2d 553, 559 (8th Cir. 1993) (en banc). It must be remembered that "Congress aimed to create a 'two-tiered liability scheme,' under which some but not all ADEA violations would give rise to liquidated damages." *Hazen Paper*, 113 S. Ct. at 1708. Therefore, there will necessarily be differences between the evidence in a non-willful case and the evidence in a willful case. A violation of the ADEA does not require any particular mental state, but the award of liquidated damages under the ADEA does. In the case at bar, we did not (and do not) fault Glover for failing to present "direct rather than circumstantial" evidence of discrimination, outrageous conduct by the employer, or proof that age was a "'predominant' rather than simply a determinative factor," all of which practices were criticized by *Hazen Paper*. 113 S. Ct. at 1709. Instead, we hold that though Glover has presented a case from which a jury could find he was terminated based on his age, he has not presented a case from which a jury could find that this action was taken with reckless disregard for Glover's rights under the ADEA.

III. CONCLUSION

We affirm the jury's finding of age discrimination and the award of backpay. We reverse the jury's finding of willfulness and vacate the corresponding award, as well as the awards for punitive and emotional damages. Finally, we remand to the district court so that it may modify its grant of equitable relief.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 93-1428

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

WILLIAM F. GLOVER,
Petitioner,

v.

McDONNELL DOUGLAS CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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No. 93-1428

IN THE

Supreme Court of the United States

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WILLIAM F. GLOVER,
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v.

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On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Introduction

At the beginning of this Term, petitioner asked this Court to summarily vacate the first Eighth Circuit opinion in this case and remand so that the Court of Appeals could take a "fresh look at the evidence" in light of *Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701 (1993), which had been handed down subsequent to the Eighth Circuit's ruling. This Court granted the request, and the Eighth Circuit has re-analyzed the evidence as required. But petitioner is still not satisfied and now seeks *plenary* review of the fact-specific "willfulness" determination made by the Court of Appeals after its second analysis of the record. Petitioner has

had more than his fair share of appellate review, and his most recent petition should be denied.

Petitioner's Statement of the Case is misleading in several important respects and lacks proper citations to the record. Most of petitioner's factual misstatements relate to his job performance with McDonnell. Contrary to his assertions, petitioner's performance cannot be described as "competent" or "positive" (Pet. 3). Petitioner never earned a promotion during his 21-year career with McDonnell (Tr. 1:91, 100; 3:60). Although he had a college degree, petitioner was still working in an entry-level clerical position at the time of his layoff (Tr. 1:94), and he had not received a merit wage increase in more than three years (Tr. 1:60). The written indicia of plaintiff's performance were equally negative. His performance appraisals were poor (Apdx. 64-69), and he was ranked dead last among the 42 salaried accounting department employees in the 1987 totem pole, which was an evaluation technique used at McDonnell for purposes of ranking employees by who made the greater (and lesser) contributions to the work of the department (Tr. 2:70-72, 100; Deft. Ex. C).

Petitioner also mischaracterizes the role of the Review Committee in the layoff process. The Review Committee, composed of Human Resources and Law Department representatives, was formed to provide another level of review to ensure that those employees selected for layoff had been appropriately selected on a "pure business basis and ...not in violation of any company policy or law" (Tr.2:39). There is no basis in the record for petitioner's assertion that the Review Committee's role was "perfunctory" or a "rubber stamp" (Pet.8 n. 1). Instead, the Review Committee met twice with the department head, first to review the appropriate, age-neutral factors to be considered in making layoff selections and later to review information regarding individual employees on the layoff list (including petitioner) (Tr. 2:131-36).

The Court of Appeals' Opinion

On remand from this Court, the Eighth Circuit made a second analysis of the record and, in an opinion by Senior Circuit Judge Floyd R. Gibson, adhered to its previous ruling that petitioner had made a barely submissible case on liability under the ADEA to support the jury's award of backpay. The court also repeated its reversal of the awards of emotional distress damages and punitive damages under Missouri law due to insufficiency of the evidence. It likewise vacated again the award of pension credit and remanded that issue to the trial court.

With regard with the "willfulness" issue, the court explicitly analyzed the evidence under the standard required by *Hazen Paper*. Following its analysis, the court came to the same conclusion as it had in petitioner's first appeal when it applied the principles set out in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985):

> "We continue to believe that '[t]here is simply no evidence that McDonnell Douglas recklessly disregarded the possibility of an ADEA violation, and there is no contention that the company knew its actions were discriminatory' [citation omitted]. Therefore, there was insufficient evidence to sustain the jury's determination that the violation was willful, and liquidated damages should not be awarded" (Pet. Apdx. A-6).

A petition for rehearing and a suggestion for rehearing en banc were denied.[1]

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[1] Pursuant to Sup. Ct. Rule 29.1, respondent states that it has no parent corporation. It has only one subsidiary that is not wholly-owned: Finnair American Trade, Inc., of which the minority shareholder, Finnair OY, owns 20%.

REASONS WHY THE WRIT SHOULD BE DENIED

Petitioner's petition represents his sixth attempt to persuade an appellate court that he is entitled to liquidated damages. On a full review of the record, the Court of Appeals has now twice reversed the jury's finding of a willful violation of the ADEA under the standard set out in *Thurston* and reaffirmed in *Hazen Paper*. The Eighth Circuit has likewise twice refused to rehear the "willfulness" issue en banc. There is nothing about this case deserving of this Court's attention, and it is now time to close the book on this litigation, more than six years after petitioner's layoff.

I. THE COURT OF APPEALS ANALYZED THE SUFFICIENCY OF EVIDENCE OF "WILLFULNESS" UNDER THE STANDARD OF HAZEN PAPER CO. V. BIGGINS.

The Court of Appeals properly analyzed the sufficiency of the evidence of "willfulness" under the standard recently reaffirmed in *Hazen Paper*. That test — whether "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute" — was the same one applied by the Court of Appeals when it first reversed the award of liquidated damages under *Thurston*. *Hazen Paper*, 113 S. Ct. at 1710. The Eighth Circuit found that the evidence in the record was insufficient to support a finding of "willfulness" under *Thurston* and *Hazen Paper*:

> "It is contended that, because Barbeau had been briefed about the basic requirements and prohibitions of the ADEA, and because Barbeau had been found to violate the ADEA, he must have committed his violation recklessly. However, *Thurston* itself rejected this argument when it declined to hold 'that a violation of the Act is "willful" if the employer simply knew of the potential applicability of the ADEA'" (Pet. Apdx. A-6, A-7).

Thus, the Court of Appeals did no more than recognize that ADEA liability and willfulness are legally and definitionally distinct under the *Hazen Paper* standard and that the two-tiered liability scheme under the ADEA simply means the evidence in a willful case must prove more than the evidence in a non-willful case — "there will necessarily be differences between the evidence in a non-willful case and the evidence in a willful case" (Pet. Apdx. A-7). In recognizing the differences between ADEA liability and willfulness, the Eighth Circuit's ruling was consistent with the ADEA's two-tiered liability scheme which was reaffirmed in *Hazen Paper*: "[W]e continue to believe that the 'knowledge or reckless disregard' standard will create two tiers of liability across the range of ADEA cases." 113 S. Ct. at 1709.

Petitioner's real objective is the complete eradication of the two-tiered liability scheme endorsed in *Hazen Paper* and the automatic doubling of damages for any ADEA violation. The petition contains several clues which unmask this objective. Petitioner says that "an almost automatic award of liquidated damages" should follow a finding of ADEA violation (Pet. 10), and that an award of liquidated damages should result "in most cases" of ADEA liability (Pet. 13). This approach is contrary to the statutory language of the ADEA and Supreme Court precedent through 1993.

II. THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE PROPER WILLFULNESS STANDARD.

Petitioner's attempt to identify a conflict among the circuits regarding the application of the willfulness standard set out in *Hazen Paper* is wholly artificial. The few cases cited by petitioner pre-date *Hazen Paper* and cannot be used to create a conflict which does not currently exist.[2] Indeed, in his first

[2] Interestingly, the federal appellate cases cited by petitioner, while not evidencing a current conflict among the circuits, clearly embrace the two-tiered liability scheme mandated by this Court which petitioner seeks to dismantle.

Petition for Certiorari, petitioner argued that the recent en banc decision of the Eighth Circuit in *Brown v. Stites Concrete, Inc.*, 994 F.2d 553 (8th Cir. 1993), had adopted the very position advocated here by petitioner by properly rejecting the higher standards of proof of "willfulness" which developed in certain circuits following *Thurston*. Petitioner obviously does not now argue that *Brown* is in conflict with decisions in any other circuits, and the same en banc Eighth Circuit, which petitioner applauded for its *Brown* decision, clearly felt that *Brown* was not in conflict with this case when it rejected petitioner's rehearing request.

The various courts of appeals have consistently applied the willfulness standard mandated by this Court in *Hazen Paper* only last year. In doing so, they have reaffirmed the same two-tiered liability scheme under the ADEA which petitioner attacks in this case. *See, e.g., Purcell v. Sequin State Bank and Trust Co.*, 999 F.2d 950 (5th Cir. 1993); *Baker v. Delta Airlines*, 6 F.3d 632 (9th Cir. 1993). There is simply no conflict among the circuits on the "willfulness" issue. This Court has announced the rule applicable to that issue in *Hazen Paper*, and it was properly applied to the facts of this case.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be denied.

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No.

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

DOROTHY E. MEGGERS, JAMES C. EWIN, and DOROTHY C. EWIN,

Petitioners,

v.

EXXON COMPANY U.S.A., WILLIAM A. PERDUE, CHEL GOLANSKY, and MARK I. HOLLAND,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This petition raises the issue of the constitutionality of a state statute, Virginia Code § 8.01-230, which provides in cases of damage to property that the limitations period begins to run when "breach of duty occurs" and not when the right of action accrues. The Virginia courts held that this statute time-barred petitioners' common law nuisance and trespass claims for damages for underground gasoline contamination prior to the date petitioners were even damaged and prior to the existence of any Virginia common law cause of action.

1. Whether Virginia Code § 8.01-230 as applied to petitioners' claims of common law nuisance and trespass constitutes a taking of private property without compensation and for private use in violation of the due process clause of the Fourteenth Amendment of the United

States Constitution, in that petitioners received no compensation for property rights transferred to Exxon without their knowledge or consent.

2. Whether Virginia Code § 8.01-230, which bars the landowners' current and future claims for trespass and nuisance, violates due process rights guaranteed by the Fourteenth Amendment of the United States Constitution by depriving landowners of protected property interests, where the statute of limitations expired before such claims accrued and failed to provide a reasonably adequate period of time for filing suit, and where, as here, no legitimate state objective is implicated for protecting tortfeasors who conceal discharge of gasoline.

3. Whether the Virginia statute of limitations, as applied to petitioners'

claims of trespass and nuisance, violates petitioners' right to equal protection of the law provided by the Fourteenth Amendment of the Uunited States Constitution.

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SUPREME COURT OF THE UNITED STATES

October Term 1993

No.

DOROTHY E. MEGGERS, JAMES C. EWIN, and DOROTHY C. EWIN,

PETITIONERS,

v.

EXXON COMPANY U.S.A., WILLIAM A. PERDUE, CHEL GOLANSKY, and MARK I. HOLLAND,

RESPONDENTS.

Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

Petitioners Dorothy E. Meggers, James C. Ewin, and Dorothy C. Ewin pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Virginia, entered on January 7, 1994, denying reconsideration of the Court's Order denying review issued on November 3, 1993.

DECISIONS BELOW

The Supreme Court of Virginia denied Petition for Appeal on November 3, 1993. This Order is unreported and is reprinted in Appendix A hereto at 1a.

The Supreme Court of Virginia denied the Petition for Rehearing on January 7, 1994. This Order is unreported and is reprinted in Appendix B hereto at 2a.

The Circuit Court of Arlington County, Virginia, entered Final Order of Dismissal with prejudice on April 30, 1993. This Order is unreported and is reprinted in Appendix C hereto at 3a.

The Circuit Court of Arlington County, Virginia, entered an Order denying Petitioners' Motions for Reconsideration on May 21, 1993. This Order is unreported and is reprinted in Appendix D hereto at 7a.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED

The judgment sought to be reviewed was initially entered on November 3, 1993, by the Supreme Court of Virginia. The denial of request for a rehearing was entered January 7, 1994. The statutory provision conferring jurisdiction on this Court to review the judgment by Writ of Certiorari is U.S.C. § 28-1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Fourteenth Amendment, Section 1, second sentence:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its

> jurisdiction the equal protection of the laws.

Virginia Code § 8.01-230 provides:

> In every action for which a limitation period is prescribed, the cause of action shall be deemed to accrue and the prescribed limitation period shall begin to run from the date the injury is sustained in the case of injury to the person, when the breach of contract or duty occurs in the case of damage to property and not when the resulting damage is discovered, except where the relief sought is solely equitable or where otherwise provided under § 8.01-233, subsection C of § 8.01-245, §§ 8.01-249, 8.01-250 or other statute.

(Emphasis added.)

Virginia Code § 8.01-243(B) provides:

> Every action for injury to property, including actions by a parent or guardian of an infant against a tort-feasor for expenses of curing or attempting to

> cure such infant from the result of a personal injury or loss of services to such infant, shall be brought within five years after the cause of action accrues.

(Emphasis added.)

STATEMENT OF THE CASE

A.

Under Virginia law, a statute of limitations does not begin to run until a right of action accrues, and damages or injury is an essential element of a right of action in trespass or nuisance.

Effective October 1, 1977, the Virginia legislature recodified the state statutes dealing with procedure in the Virginia courts and, in the process, amended the provision governing the accrual of causes of action. Section 8.01-230 was changed to provide that in cases involving damage to property the

statute of limitations can expire before there is any injury giving rise to a right of action.

On March 15, 1991, petitioners Dorothy Ewin Meggers, James L. Ewin, and their ninety-three year old mother, Dorothy C. Ewin, filed suit in the Circuit Court of Arlington County, Virginia, against Exxon Company U.S.A. and other former owners and operators of an Exxon retail gasoline station located uphill from commercial property owned by the Ewin family at 3435 North Washington Boulevard in Arlington.

The lawsuit sought monetary damages and injunctive relief under the common law of Virginia for trespass and nuisance resulting from the discovery in June 1990 of 5.5 inches of free-floating gasoline in the groundwater under the Ewin property and, thereafter, the discovery of

substantial additional free-floating underground gasoline contamination located upgrade from the Ewin property which had not yet entered the property.[1]

Since 1964, the Ewin family had operated an automobile radiator and air conditioning repair business. Pursuant to a June 1990 lease and sale agreement, the family moved its business to Falls Church, Virginia. In September 1990, the lease and sale agreement was cancelled as a result of the discovery of the previously unknown gasoline contamination. The Ewin family was unable, because of the presence of the gasoline, to find a new tenant until June 1992, and then only at a significantly reduced rental.

---

[1] Petitioners also raised state law claims of negligence and statutory torts which are not at issue here.

The Ewins' expert witnesses identified with reasonable scientific certainty the source of the underground gasoline contamination as five leaking 3000-gallon underground gasoline storage tanks located on the Exxon gasoline station property, which were 33 years old when they were removed by Exxon in November 1986.[2]

Defendant Exxon, with full knowledge of the easterly downhill movement of its underground gasoline, decided in 1987 not to undertake any remedial recovery or clean up. Instead, Exxon affirmatively acted to conceal from Virginia officials

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[2] Prior to Ewin family ownership in 1964, the property was operated briefly as a retail gasoline station. Although Exxon argued throughout that the gasoline contamination could have originated from other sources, the extensive discovery produced no other credible explanation for the 5.5 inches of free-floating gasoline found on the Ewin property in 1990.

and downhill property owners, including the Ewin family, the environmental injuries Exxon had set in motion.[3]

The Ewin family obtained evidence during the Arlington County proceedings that the five dangerous and defective Exxon underground gasoline storage tanks had discharged thousands of gallons of gasoline into the groundwater under the Exxon station from 1977 through November

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[3] In February 1992, the Virginia Department of Environmental Quality also determined that Exxon was the source of the underground gasoline. Despite repeated directives to Exxon to remediate its contamination, Exxon has failed to do so. Of course, mere clean up of the contamination will not make petitioners whole.

1986.[4] Petitioners learned during discovery that land and groundwater upgrade from their property currently contain gasoline contamination from the former Exxon property which continues to flow downhill onto petitioners' property. Each day some of the gasoline enters the Ewin family property for the first time as part of the groundwater movement. The ongoing gasoline contamination will continue in the future to damage petitioners' property.

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[4] Humble Oil and Refining Company, Exxon Company U.S.A.'s predecessor, purchased the land at 3444 North Washington Boulevard in 1969. Exxon, as owner, used the property continuously as a retail gasoline station, leasing it to William A. Perdue. Mr. Perdue purchased the gasoline station from Exxon in December 1986.

B.

Judge Paul F. Sheridan supervised pretrial proceedings in the Arlington County Circuit Court. Judge Sheridan denied Exxon's Demurrer and Exxon's Plea in Bar with respect to petitioners' claims of trespass and nuisance on December 10, 1992; he set the case for trial on March 9, 1993.

On March 9, 1993, the day set for the jury trial, Judge Benjamin Kendrick, without prior notice to petitioners of his intention to revisit Judge Sheridan's rulings, orally dismissed all petitioners' claims on the ground that they were time barred by the five-year limitation period of Virginia Code § 8.01-243. Judge Kendrick stated:

> THE COURT: . . . You can call it trespass. You can call it anything you want. This started in 1977. You've got a

> serious problem, counsel, and it's a harsh result. There is no question about it. That's the state of the law. I don't know how you are going to get around it.

Transcript of March 9, 1993, Hearing at 15.

Judge Kendrick continued: "Your cause of action started before the gas even got to your property. That's how harsh that rule is." Transcript of March 9, 1993, Hearing at 16.

Petitioners filed motions for reconsideration on April 9, 1993. They were heard on April 30, 1993, and Judge Kendrick orally denied petitioners' motions for reconsideration.

Judge Kendrick held that Virginia Code §§ 8.01-230 and 8.01-243 rendered all of petitioners' claims time barred because the five-year period for petitioners' claims began to run in 1977, the date of

the first documented discharge of gasoline from the Exxon property, prior to any entry of gasoline onto petitioners' property.

C.

The issues of denial of due process and equal protection under the Fourteenth Amendment of the Constitution of the United States were raised before Judge Kendrick on March 9, 1993, and again on April 30, 1993.[5] Counsel for petitioners requested the trial court, on April 30, 1993, to sign an order of dismissal which specifically incorporated reference to the

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[5] Petitioners also raised before Judge Sheridan the issue whether Virginia Code § 8.01-230 violated the due process and equal protection clauses of the United States Constitution in response to a motion for partial summary judgment, but the issue was not ruled upon because Judge Sheridan denied Exxon's motions on other grounds.

due process and equal protection claims. The trial court refused to do so stating:

> THE COURT: That might be the only way you're going to get relief from the obvious harshness of that statute and the ruling of this Court. But I'm signing [Exxon counsel's] order.

Transcript of April 30, 1993, Hearing at 12.

On May 21, 1993, Judge Kendrick entered his written final Order denying petitioners' motions for reconsideration. On May 25, 1993, petitioners timely filed their Notice of Appeal to the Virginia Supreme Court.

In their Petition for Appeal to the Virginia Supreme Court, petitioners squarely addressed their federal constitutional claims, along with numerous state law claims. The petition was timely

filed on July 20, 1993.[6] In an Order issued on November 3, 1993, the Virginia Supreme Court completely denied review of Judge Kendrick's brief orders, stating only "[t]he Court is of the opinion there is no reversible error in the judgment." On November 17, 1993, petitioners timely filed a Petition for Rehearing, which also raised their constitutional arguments. On

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[6] Question 5 of the Petition for Appeal states:

> The trial court erred in interpreting Virginia Code § 8.01-230 as barring plaintiffs' claims before any damage had occurred, thereby denying plaintiffs any remedy against defendants' unlawful taking of private property and, thus, violating plaintiffs' rights under the due process and equal protection clauses of the Constitutions of the Commonwealth of Virginia and the United States of America.

January 7, 1994, the Virginia Supreme Court denied the Petition for Rehearing.

ARGUMENT

The Petition for Certiorari should be granted because the Virginia court of last resort has decided an important question of federal law which has not been, but should be, settled by this Court. See Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478 (1988) and Mills v. Habluetzel, 456 U.S. 91 (1982). Virginia Code § 8.01-230 violates the due process clause of the United States Constitution by depriving petitioners of property without compensation or due process of law and without a full and fair opportunity to protect their property rights, in violation of Missouri Pacific Ry. Co. v. Nebraska, 164 U.S. 403, 417 (1896). Virginia Code § 8.01-230 is

inconsistent with well settled constitutional principles that apply to statutes of limitations. E.g., Terry v. Anderson, 95 U.S. 628, 632-633 (1877), cited in Texaco, Inc. v. Short, 454 U.S. 516, 527 n.21 (1982). In addition, the statute denies petitioners equal protection of the law, contrary to the teachings of Zobel v. Williams, 457 U.S. 55 (1982).

I.

Under Virginia law, it has been well settled that a statute of limitations does not begin to run until a right of action accrues, and damage or injury is an essential element of a right of action in tort or nuisance. Marshall v. Bird, 334 S.E.2d 573, 575 (Va. 1985); Locke v. Johns-Manville Corp., 275 S.E.2d 900, 904 (Va. 1981).

Whether petitioners possessed any property rights of which they could be deprived is determined by Virginia law. Board of Regents v. Roth, 408 U.S. 464, 577 (1972). Under Virginia law, petitioners, who own real estate on Washington Boulevard in fee simple, have a protectable property interest as a result of that ownership. The effect of the Virginia courts' interpretation of the statute in petitioners' case is to transfer to the owners of upgrade property a permanent easement to spill gasoline which will continue to contaminate petitioners' land. Petitioners' property rights are now encumbered by the right of respondents to pollute.

The landowners' right to exclude has traditionally been considered "one of the most essential sticks in the bundle of rights that are commonly characterized as

property." Loretto v. Teleprompter Manhattan CATC Corp., 458 U.S. 419, 433 (1982), citing Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979) (physical occupation of property is a taking). As there has been an actual physical invasion of petitioners' property in the nature of an easement, petitioners are the victims of a diminution of property rights and an illegal "taking" of property for private use of another, i.e., the owners of the Exxon property. Loretto, 458 U.S. at 441.

It is well settled that taking property from one individual for the private use of another individual violates due process. Missouri Pacific Ry. Co. v. Nebraska, 164 U.S. at 417 (citation omitted). It is similarly undisputed that Virginia could not directly take that property interest from petitioners for

public benefit without paying any compensation. Loretto, 458 U.S. at 435.

While Virginia could not take an easement in petitioners' land for itself without compensating petitioners, United States v. Causby, 328 U.S. 256, 261-262 (1946) (a physical invasion of only an easement in property is a taking), by means of the state statute of limitations the Virginia legislature has conveyed to the owners of the Exxon property such an easement to discharge gasoline onto petitioners' property. Petitioners are unable to recover for present and future invasion of their property rights or to require respondents to remove their gasoline from petitioners' property.

"A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be

void." Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 245 (1984). A statute which permits Virginia to do for the benefit of respondents what it cannot do for the public good of its own citizens, take a property right in the form of an easement from petitioners without compensation, deprives petitioners of their right to property in violation of the Fourteenth Amendment of the Constitution of the United States.

II.

A.

Petitioners also possess property interests protected by the Fourteenth Amendment's Due Process clause in the form of causes of action for nuisance and trespass. Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982). This right of property cannot be taken away from

petitioners without due process of law. While Martinez v. California, 444 U.S. 277 (1980), holds generally that the action of a legislature in fashioning its own tort law would give all the process that is due, nevertheless, the individual citizen has a right to be protected from wholly arbitrary or irrational state action. Id. at 282. A statute that takes away a valuable right without being related to any legitimate government objective violates the Fourteenth Amendment. As interpreted by the Virginia courts and as applied to petitioners, the statute in question is wholly irrational and arbitrary.

B.

"Every government is under obligation to its citizens to afford them all needful remedies." Wilson v. Iseminger, 185 U.S.

55, 62 (1902). As Justice Brandeis observed:

> Whether acting through its judiciary or through its Legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 682 (1930) (footnote omitted). The Fourteenth Amendment guarantees "the preservation of his substantial right to redress by some effective procedure." Gibbes v. Zimmerman, 290 U.S. 326, 332 (1933). Where a statute of limitations would operate so as to bar all recovery without any allowance of time for the commencement thereof in futuro, it is usually deemed unconstitutional in its operation on

vested rights. See Terry v. Anderson, 95 U.S. at 632-633.

Statutes of limitations are valid exercises of state power. The Court has held that statutes of limitations are proper only when the injured party has adequate time for assertion of his rights. Atchafalaya Land Co. v. F. B. Williams Cypress Co., 258 U.S. 190 (1922). However, to be constitutional, the statute of limitation must provide a reasonable time for the commencement of an action. Terry v. Anderson, 95 U.S. at 632-633,

cited in Texaco v. Short, 454 U.S. at 527 n.21.[7]

The Virginia statute at issue violates petitioners' right to due process because Virginia law provides an inadequate period of time for filing suit. Where the statute was deemed to have run even before any injury was caused to the petitioners' property, petitioners

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[7] The Court raised the question of a limitation period too short to be constitutional in Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478 (1988), but decided the case on other grounds. See dissent of Chief Justice Rehnquist, 485 U.S. at 494.

This Court noted in a challenge to a Texas statute of limitation, the period for asserting the right "must be sufficiently long to permit [interested persons] to bring an action." Mills v. Habluetzel, 456 U.S. at 97.

Appellant in Mills argued that the statute in question deprived illegitimate children of their right to support without due process of law. The Court ruled on equal protection grounds and did not reach the due process argument.

effectively had no opportunity to file suit, which is inadequate time as a matter of constitutional law. See Heath v. Sears, Roebuck & Co., 464 A.2d 288 (N.H. 1983).

C.

The Virginia court in this case, in effect, holds that the Virginia legislature redefined the elements of two ancient and venerable causes of action designed to protect property rights through the device of recodifying a statute of limitations. It holds that petitioners had a cause of action and should have filed their case before the gasoline reached their property and because they waited until their property was injured, they filed too late.

Under Virginia law, the unauthorized entry of gasoline contamination onto

petitioners' property without lawful authority and the resultant injury or damage to petitioners' real property is a trespass. Hampton Roads Sanitation Dist. v. McDonnell, 360 S.E.2d 841 (Va. 1987) (discharge of raw sewage onto plaintiff's property by a public sewage authority is a trespass). Here, the Virginia courts ruled that the statute of limitations ran before all of the elements of a traditional trespass were established.

Under Virginia law, the presence of gasoline contamination on petitioners' property constitutes a classic case of private nuisance, a threat to health and safety, which unreasonably interferes with the use and enjoyment of another's property and causes serious economic injury to petitioners' ability to lease or sell their property. City of Virginia Beach v. Murphy, 389 S.E.2d 462, 463 (Va.

1990), citing Newport News v. Hetzler, 221 S.E.2d 146, 150 (Va. 1976).

The Virginia courts have defined nuisance as a cause of action to protect the use and enjoyment of property. An essential element of the cause of action has always been that the petitioner's use and enjoyment of the property was impaired and there could be no nuisance without such impairment.

In an action to recover damages for a private nuisance, once the plaintiff proves the existence of the nuisance causing injury to property, it is immaterial whether the nuisance was created negligently or not. Thus, a breach of duty is irrelevant to a claim of nuisance. E.g., G.L. Webster Co. v. Steelman, 1 S.E.2d 305, 311 (Va. 1939).

Under the traditional and longstanding version of Virginia law,

petitioners' cause of action for nuisance would not arise until it could be proven that gasoline reached petitioners' property and "the injury can be shown." Id. at 314-315 (citation omitted); Blue Ridge Poultry & Egg Co., Inc. v. Clark, 176 S.E.2d 323, 326 (Va. 1970). See also American Locomotive Co. v. Hoffman, 61 S.E 759, 760 (Va. 1908) (cause of action for nuisance does not arise from construction of culverts and water gate on another's land, but only when plaintiff is damaged by water entering his land).

Here, the Virginia court ruled that the statute of limitations ran before all of the traditional elements of trespass and nuisance were established. Petitioners were thus deprived of undiminished property rights and their causes of action against respondents for the loss of those property rights.

D.

The statute, as applied to petitioners, fails to meet the test of being rationally related to a legitimate state end. The Virginia legislature is unlikely to have intended to change the state's substantive law through its 1977 codification of Virginia's statute of limitations. The Revisers' Note appended to § 8.01-230 in the Code of Virginia Annotated states:

> Section 8.01-230 retains the traditional rule of Virginia case law that a cause of action accrues when the wrongful act or breach of duty or contract occurs. In tort cases this has generally been construed to occur when injury or other damage takes place irrespective of when discovered.

The Virginia Supreme Court has interpreted the statute as creating a

distinct change in law for cases in which no compensable injury to property occurs until substantially after the breach of duty, and has decreed that the statute of limitations runs from the date of the breach of duty, not from the date of the later injury. Harbour Gate Owners Association, Inc. v. Berg, 348 S.E.2d 252 (Va. 1986).[8] The Virginia Supreme Court has observed: "It seems unlikely that the revisors intended the harsh result dictated by its clear language." Id. at 258 n.3.

Justice Stephenson of the Virginia Supreme Court stated in Keller v. Denny:

> To the extent that Code § 8.01-230 bars a cause of action before any damage has occurred, its

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[8] The statute as read literally would create a cause of action after the breach of duty but prior to the date any injury was sustained.

> application would deprive a person of property without due process of law in violation of the Federal and Virginia constitutions.

352 S.E.2d 327, 332 (1987) (emphasis in original) (citations omitted) (concurring).

Thus, no identifiable government objective is furthered by the change in § 8.01-230, as the drafters of the 1977 revision did not consider the implications of the change in language for nuisance and trespass cases in which the duty might be breached many years prior to the occurrence of damages.

Virginia may not extinguish or limit property rights in the absence of "a reasonable restriction designed to further legitimate legislative objectives." United States v. Locke, 471 U.S. 84, 104 (1985). The statute, as applied to

petitioners, fails the test of being rationally related to a legitimate legislative objective.[9] Zobel v. Williams, 457 U.S. 55 (1982). There is no rational basis for beginning the running of the statute of limitations prior to the existence of a cause of action for nuisance or trespass. Heath v. Sears, Roebuck & Co., 464 A.2d at 295. Since no legitimate state objective exists, this statute offends due process. Moore v. City of East Cleveland, 431 U.S. 494, 520 (1977) (Stevens, J., concurring), citing Euclid v. Ambly Realty Co., 272 U.S. 365 (1926).

As applied, Virginia Code § 8.01-230 is arbitrary and irrational. The statute

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[9] The failure of Exxon to advance any plausible or legitimate reason for the challenged distinction is sufficient to permit its invalidation. See Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429 (1978) (commerce clause).

does not advance the legitimate objectives of a statute of limitations. The trespass and nuisance claims of the petitioners were not stale. The gasoline to this day continues to run downhill to petitioners' property and into the Virginia waterways.[10]

Virginia has separately enacted legislation it calls a statute of repose designed to cut off all litigation after a certain number of years against such defendants as architects of buildings. Va. Code § 8.01-250. Because Virginia views its statute of repose as a narrowly defined exception to the general limitations law, Commonwealth v. Owens-Corning Fiberglas Corp., 385 S.E.2d 865

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[10] State and federal laws create a duty to remedy the source of the contamination. § 42 U.S.C. 699, et seq., and regulations promulgated thereunder, 40 C.F.R. Parts 280, 281 (1993); Virginia Code § 62.1-44.34:9(9) (1993 Supp.).

(1989), the state's limitations statutes as a whole cannot be read to provide that the legislature also intended to establish a date when downhill victims of gasoline contamination might be barred from suit in trespass or nuisance based on the date of the first uphill spill.

Moreover, justifications underlying a statute of repose do not apply here where the gasoline contamination continues its downhill trek to Virginia waterways. Although statutes of repose have often been upheld against constitutional challenges, the courts have upheld such statutes only when reasonable government

objectives have been articulated.[11] No such objectives have been articulated here.

Under well settled legal principles from which Virginia should not be deemed to depart unintentionally, no tort cause of action accrues until the victim actually suffers damages. There can be no legitimate state objective for beginning the running of the statute of limitations in nuisance and trespass cases prior to the existence of any injury. The legislature itself has not articulated any such end, and neither have the Virginia courts in their several opinions discussing the statute.

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[11] Statutes of repose have been upheld principally in products liability cases. See Alexander v. Beech Aircraft Corp., 952 F.2d 1215, 1224-1225 (10th Cir. 1991), and cases cited therein. We are unaware of any case applying a statute of repose to extinguish nuisance or trespass claims.

Finally, no Virginia legitimate state goals are advanced by the statute of limitations as applied to petitioners' situation. Such a provision favors only tortfeasors who discharge gasoline contamination.

This Court has upheld the power of a state to permit unused or abandoned interests in property to revert to another after the passage of time or to condition retention of property rights on the performance of reasonable conditions. Texaco, Inc. v. Short, 454 U.S. at 526 (legitimate state policies of encouraging development of potential mineral interests), citing Hawkins v. Barney's Lessee, 5 Pet. 457, 466 (1831) (landowner was not vigilant in asserting his rights). The Court has never permitted abridgement of substantial property rights against a party vigilant in asserting his rights

when the violation of the right continued even to the time of trial.

III.

The Due Process Clause of the Constitution of the United States provides that the state may not deprive a person of a property interest without providing notice and an opportunity for a hearing. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950); Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978) (notice of dispute resolution mechanism and opportunity to be heard is required before service may be terminated by a public utility for failure to tender payment due); Fuentes v. Shevin, 407 U.S. 67 (1972) (notice and an opportunity to be heard before property is seized pursuant

to a prejudgment replevin order); Bell v. Burson, 402 U.S. 535 (1971) (notice and an opportunity to be heard before a driver's license is suspended for failure to post security after an accident); Cohoa v. Hernandez y Morales, 230 U.S. 139 (1913).

Virginia cannot authorize deprivation of petitioners' property rights without appropriate due process. Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982). Even if Virginia could eliminate causes of action for trespass and nuisance, the state would be required to give notice whether the property right is defined as a fee simple interest unencumbered by gasoline contamination or a cause of action in nuisance or trespass. Here, there was no notice and no opportunity for petitioners to take any action to protect their property rights.

A greater degree of state involvement is found here than in Texaco v. Short, 454 U.S. at 533-534, because Virginia law prevents petitioners from filing suit prior to invasion of their property by gasoline for the reason that the right of action has not yet accrued, and also prevents them from filing suit after the gasoline reaches their property on the ground that the statute of limitations has run. See Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478 (1988) (state involvement in probate).

IV.

The Equal Protection clause of the Fourteenth Amendment requires that all persons similarly situated be treated alike. City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985). Under the Equal Protection clause, there

are three standards which may be applicable in reviewing an equal protection challenge: strict scrutiny, intermediate scrutiny, and rational basis. Id. at 440-441.

Legislation that infringes a fundamental right must be examined under a strict scrutiny standard of review. Id. at 440; Harper v. Virginia State Board of Elections, 383 U.S. 663, 670 (1966) (right of franchise). Since the right to own and enjoy real property is a fundamental right, the Court should review petitioners' equal protection challenge under the strict scrutiny standard of review.

Even if the Court were to conclude that rational basis review is the appropriate standard, this statute, as applied to the discharge of gasoline, fails to "bear some rational relationship

to a legitimate state end." McDonald v. Board of Election, 394 U.S. 802, 809 (1969).

Equal protection is violated where harmful disparities in state treatment have no legitimate basis. Allegheny Pittsburgh Coal Co. v. Webster County, 488 U.S. 336 (1989); Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985); Zobel v. Williams, 457 U.S. 55 (1982).[12]

At a minimum, the Equal Protection clause requires that legislation classify the persons it affects in a manner rationally related to a legitimate governmental objective. The classification scheme must "rationally advanc[e] a reasonable and identifiable

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[12] Dictum to the contrary found in New Orleans v. Dukes, 427 U.S. 297, 306 (1976), appears to have been superseded by the cases cited above. See Nordlinger v. Hahn, ___ U.S.___, 112 S. Ct. 2326 (1992).

governmental objective." Logan v. Zimmerman Brush Co., 455 U.S. at 439 (separate opinion by Blackmun, J.), quoting Schweiker v. Wilson, 450 U.S. 221, 235 (1981).

Since, as noted above, the drafters of the 1977 amendment did not intend to change the statute of limitations for trespass and nuisance when the duty was breached many years prior to any damages, the change in § 8.01-230 cannot be said to be rationally related to any legitimate government objective. See F.C.C. v. Beach Communications, Inc., ___ U.S. ___, 113 S. Ct. 2096, 2106 n.3 (1993) (Stevens, J., concurring in judgment).

No reasonable government objective is to be furthered in barring claims by property owners arising in trespass or nuisance resulting from underground pollution prior to their accrual or in

denying equal remedies to those property owners whose actions are time barred prior to their suffering any injury. The Commonwealth of Virginia has no legitimate interest in protecting persons discharging gasoline against petitioners' claims.

There is no rational basis for discriminating against a class of plaintiffs whose causes of action are time barred prior to their being injured by the presence of hidden underground gasoline contamination for the purpose of protecting underground polluters. Heath v. Sears, Roebuck & Co., 464 A.2d at 296 (N.H. 1983).

CONCLUSION

This case presents important due process and equal protection issues regarding the constitutionality of the Virginia statute, including the due

process issues which this Court left unresolved in Mills v. Habluetzel, 456 U.S. 91 (1982), and Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478 (1988). Citizens of Virginia are entitled to due process and equal protection as guaranteed by the Fourteenth Amendment. For these reasons, this Court should grant the Petition for Certiorari.

Respectfully submitted,

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Counsel for Petitioners

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APPENDIX

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 3rd day of November, 1993.

DOROTHY EWIN MEGGERS, et al., Appellants,

against Record No. 930997
Circuit Court No. L91-329

Exxon Corporation, et al., Appellees.

From the Circuit Court of Arlington County

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

David B. Beach, Clerk

By: /s/ A a a i

Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 7th day of January, 1994.

DOROTHY EWIN MEGGERS, et al., Appellants,

against Record No. 930997
Circuit Court No. L91-329

Exxon Corporation, et al., Appellees.

From the Circuit Court of Arlington County

Upon a Petition for Rehearing

On consideration of the petition of the appellants to set aside the judgment rendered herein on the 3rd day of November, 1993 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

/s/ David B. Beach
Clerk

V I R G I N I A:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

DOROTHY EWIN MEGGERS, et al.	:	
	:	
Plaintiff	:	
	:	
v.	:	AT LAW
	:	NO. 91-329
EXXON CORPORATION, et al.	:	
	:	
Defendant	:	

FINAL ORDER OF DISMISSAL

CAME THE PARTIES on March 9, 1993, before Judge Benjamin Kendrick for trial in this matter, and the Court having taken judicial notice of the prior rulings of the Honorable Paul F. Sheridan with respect to the applicability of Virginia Code § 8.01-230 and § 8.01-243 to this case;

The Court having determined that in the absence of a justiciable issue with respect to equitable estoppel, the application of the aforesaid code

provisions would render the remaining claims of the plaintiffs time barred, and having as a result thereof requested a proffer of evidence from the parties with respect to the issue of equitable estoppel;

The Court having heard and considered the aforesaid proffers, all as more fully set forth in the Transcript of Trial Proceedings dated March 9, 1993, and Exxon having renewed by motion its plea in bar heretofore made to dismiss the case based on the Statutes of Limitations, it was thereafter

ORDERED that the defendant Exxon Corporation's motion to Dismiss was granted;

ORDERED that the case be dismissed with prejudice.

ENTERED this 30th day of April, 1993.

/s/ Benjamin Kendrick
Judge Benjamin N.A. Kendrick

WE ASK FOR THIS:

SLENKER, BRANDT, JENNINGS & JOHNSTON

By: /s/ Tina L. Snee
Tina L. Snee, Esq.
Counsel for Defendant Exxon Corp.
P. O. Box 2908
Merrifield, Virginia 22116-2908

ARCHER & GREINER
A Professional Corporation

By: /s/ Robert T. Lehman
Robert T. Lehman
Attorneys for Defendant Exxon Corp.
One Centennial Square
P. O. Box 3000
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MCDONALD & KARL Seen and objected to

By: /s/ Bradley G. McDonald
Bradley G. McDonald
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1919 Pennsylvania Avenue, N.W.
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A COPY:
TESTE: DAVID A. BELL, Clerk

By Beverly J. Key
Deputy Clerk

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

DOROTHY EWIN MEGGERS, et al.,	:	
Plaintiffs,	:	
vs.	:	At Law No. 91-329
EXXON CORPORATION, et al.,	:	
Defendants.	:	

ORDER

CAME THE PARTIES on April 30, 1993, on plaintiffs' Motion for Reconsideration of the Ruling by Judge Benjamin Kendrick dismissing plaintiffs' claims.

The Court having duly considered plaintiffs pleadings in support of the Motion for Reconsideration and the response thereto, and having heard the arguments of counsel in open court, it is

hereby ORDERED that the plaintiffs' Motions for Reconsideration is denied.

ENTERED this 21st day of May, 1993.

/s/ Benjamin Kendrick
Benjamin N.A. Kendrick, Judge

WE ASK FOR THIS:

SLENKER, BRANDT, JENNINGS & JOHNSTON

By: /s/ Tina L. Snee
Tina L. Snee, Esquire
Attorneys for Defendant Exxon Corporation
P. O. Box 2908
Merrifield, VA 22116

SEEN AND OBJECTION NOTED:

SCHWARTZ, ELLIS & MOORE

By: /s/ William B. Moore
William B. Moore, Esquire
Attorney for Plaintiffs
6950 North Fairfax Drive
Arlington, Virginia 22213

A COPY:
TESTE: DAVID A. BELL, Clerk

By Beverly J. Key
Deputy Clerk

No. 93-1515

Supreme Court, U.S.
FILED
APR 25 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

DOROTHY E. MEGGERS, JAMES C. EWIN, and DOROTHY C. EWIN,

Petitioners,

v.

EXXON COMPANY, U.S.A., WILLIAM A. PERDUE, CHEL GOLANSKY and MARK I. HOLLAND,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

RESPONDENT'S BRIEF IN OPPOSITION

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**Counsel of Record for Respondent Exxon Company, U.S.A.*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Should A Petition For Writ of Certiorari Which Challenges The Constitutionality Of A State Statute Be Granted When The Challenge Was Not Timely Raised Below?

RULE 29.1 STATEMENT

Respondent Exxon Company, U.S.A. is an unincorporated division of Exxon Corporation and has no subsidiaries.

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No. 93-1515

In The

Supreme Court of the United States

October Term, 1993

DOROTHY E. MEGGERS, JAMES C. EWIN, and DOROTHY C. EWIN,

Petitioners,

v.

EXXON COMPANY, U.S.A., WILLIAM A. PERDUE, CHEL GOLANSKY and MARK I. HOLLAND,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Exxon Company, U.S.A., respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Supreme Court of Virginia's Order in this case.

STATUTORY PROVISION INVOLVED

Respondent agrees that petitioners put Virginia Code §8.01-230 at issue but did not place before the Court any other statutes in their questions seeking certiorari.

STATEMENT

This case involves two pieces of commercial property in Arlington, Virginia, both of which were, at one time or another, operated as retail gasoline service stations. The former Exxon property is located several hundred feet away, and across the street from the petitioners' property (the "Property").

A. The Instant Action

Petitioners filed the instant action in the Circuit Court of Arlington County, Virginia, on March 15, 1991, alleging that their Property was damaged by contamination which was discovered in June, 1990 and that that contamination emanated from the Exxon property. The record clearly demonstrates that the only evidence of a release of petroleum product on the Exxon property is the testimony of Exxon's former operator, Alfred Perdue, who testified that he had a loss of product in November, 1977. Immediately after Mr. Perdue notified Exxon of the loss, Exxon investigated the incident and fiberglass lined the underground storage tank in question to ensure it would not leak.

The Virginia statute of limitations requires all causes of action for injury to property be brought within five years of the breach of duty. At the close of all discovery the only evidence of a breach of duty was the November, 1977 incident. Since the trial court action was filed almost nine years after that breach, Exxon filed several pre-trial motions to limit and/or dismiss the petitioners' Motion for Judgment on the basis that the five year statute of limitations set forth in Va. Code §§8.01-230 and

8.01-243(b) barred their claims. Judge Sheridan initially ruled that the statutes of limitations set forth in Va. Code §§8.01-230 and 8.01-243(b) did apply to the facts of this case and that the statutes may bar the petitioners' claims unless the petitioners could show an equitable estoppel that would prevent Exxon from relying on the statute of limitations as a defense. (February 4, 1993 Transcript at T.20-3 to 9; T.25-8 to 19).

Immediately prior to the beginning of trial, Judge Kendrick (the trial judge) judicially noticed Judge Sheridan's prior rulings and directed the petitioners to proffer evidence as to what they would offer to prove to establish that there was an equitable estoppel. Petitioners were unable to proffer any such evidence. Consequently, Judge Kendrick found that the petitioners had failed to present sufficient evidence to create a justiciable issue for trial on the issue of estoppel. There being no evidence of estoppel, Exxon again moved to dismiss the petitioners' claims on the basis that the claims were barred by Va. Code §§8.01-230 and 8.01-243(b). Judge Kendrick granted Exxon's motion and petitioners sought reconsideration of Judge Kendrick's order dismissing their claims.

Petitioners make a procedural misstatement when they claim that they raised the constitutionality of Va. Code §§8.01-230 and 8.01-243(b) at the March 9, 1993 trial and April 30, 1993 motion for reconsideration.[1] As the

---

[1] Petitioners also made several factual misstatements. For the sake of brevity, respondent will only highlight the more significant misstatements. First, the record contains no evidence of a breach of duty other than Mr. Perdue's testimony of a loss of product in November, 1977. Second, Exxon has complied with

transcripts of those proceedings demonstrate, the petitioners neither raised, nor did the court decide, the questions petitioners now raise in their petition. In fact, the very first time petitioners raised the constitutionality of Va. Code §§8.01-230 and 8.01-243(b) was when Judge Kendrick was about to enter an order denying petitioners' motion for reconsideration. Petitioners submitted a form of order which stated Va. Code §§8.01-230 and 8.01-243(b) violated petitioners' due process and equal protection rights. Judge Kendrick rejected petitioners' form of order and entered an order which simply denied petitioners' motion for reconsideration.

Petitioners then petitioned the Virginia Supreme Court to review Judge Kendrick's decision on the basis that Va. Code §§8.01-230 and Va. Code 8.01-243(b) violated petitioners' due process and equal protection rights as provided by the Virginia and United States Constitutions. Respondent opposed that review on the basis that the Virginia Supreme Court did not have jurisdiction to review the writs of error challenging the constitutionality of Va. Code §§8.01-230 and 8.01-243(b) because petitioners had never properly raised those questions to the trial court. Rules of the Virginia Supreme Court, Rule 5:25

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whatever the Virginia Department of Water Quality has requested it to do to investigate and remediate any contamination associated with the Exxon property. Third, petitioners' experts were never able to identify with a reasonable degree of scientific probability, the source of contamination on petitioners' property. Moreover, the scientific evidence not only disputed petitioners' claims that Exxon contributed to the contamination on petitioners' property, but pointed to a source petitioners failed to join as a party.

Without commenting on petitioners' writs of error, the Virginia Supreme Court denied review of Judge Kendrick's order. Petitioners now ask this Court to grant their petition even though their questions presented were never properly raised or decided by any of the state courts below.

REASONS WHY THE PETITION SHOULD BE DENIED

1. Neither The Decision Below Nor The Record Raises The Questions Presented In The Petition

The jurisdiction of this Court in this matter is contingent upon the petitioners' ability to demonstrate that the highest Virginia court decided an important question of federal law that the petitioners properly raised and was decided by that court. 28 U.S.C. §1257(a); *Cardinale v. Louisiana,* 394 U.S. 437, 438 (1969); *McGoldrick v. Compagnie Generale,* 309 U.S. 430, 434 (1940); Rules of the Supreme Court of the United States, Rule 10 (hereinafter "Rule"). The burden rests on the petitioners to show that the question was properly raised to the highest Virginia court. *Street v. New York,* 394 U.S. 576, 582 (1969); *Mutual Life Insurance Co. v. McGrew,* 188 U.S. 291, 309 (1903).

The procedure for raising a federal question is dependent upon state law. When required by state procedures, federal questions must be timely raised and presented in order to be reviewed. *Ferguson v. Georgia,* 365 U.S. 570, 572 (1961); *In re: Lamkin,* 355 U.S. 59 (1957). The failure to follow state procedures may be fatal to the chances for Supreme Court review. *Parker v. Illinois,* 333 U.S. 571, 574-575 (1948); *Pennsylvania R. Co. v. Illinois,* 297

U.S. 447, 462-463 (1936); *Central Union Tel. Co. v. City of Edwardsville*, 269 U.S. 190, 194-195 (1925).

If the state appellate court is silent or refuses to rule on the federal question, it is presumed that the petitioner never properly presented the question in the state court. *Bailey v. Anderson*, 326 U.S. 203, 206-207 (1945). In *Bailey*, this Court dismissed an appeal of an order of the Virginia Supreme Court denying a writ of error on the basis that the issue was not properly raised in the state court below and, thus, the petition did not properly present a federal question. *See also, Mutual Life*, 188 U.S. at 309 (where this Court declined to exercise its jurisdiction where the highest state court was silent on the federal question and this Court assumed the silence was due to a procedural deficiency to raise the federal question).

The record clearly demonstrates that the petitioners never properly raised the questions presented in the state court below. Moreover, Rule 5:25 of the Rules of the Supreme Court of Virginia, states that errors will not be considered by that court if they were not raised at the time of the ruling being appealed.

Although petitioners did not question the constitutionality of Va. Code §§8.01-230 and 8.01-243(b) when the trial court made its ruling, they nonetheless petitioned the Virginia Supreme Court to review whether those statutes violated their rights under the Due Process and Equal Protection Clauses of the Constitutions of the Commonwealth of Virginia and the United States of America. Respondent argued that the questions were not raised below and thus, were not properly before the court. Rule 5:25. *See Murphy v. Comm.*, 246 Va. 136, 431 S.E.2d 48

(1993); *International Union, United Mineworkers v. Covenant Coal Corp.*, 244 Va. 417, 423 S.E.2d 197 (1992). Petitioners never disputed the fact that they had not timely raised those questions below.

The Virginia Supreme Court was silent on the questions raised by petitioners and denied review of the trial court's decision. The court's silence entitles respondents to a presumption that the petitioners never properly presented the questions to the state court. *Bailey*, 326 U.S. at 205-207; *See also Beck v. Washington*, 369 U.S. 541, 550 (1962) (where this Court recognized the reasonableness of the Washington Supreme Court's refusal to "consider constitutional attacks upon statutes not made in the trial court even where the constitutional claims arise from the trial court's interpretation of the challenged statute"); *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983) (where this Court concluded that it lacked jurisdiction to consider a federal question because it did not affirmatively appear that the question was decided in the manner required to bring that issue before the state appellate court since appellants first raised the question in their brief to state supreme court; that court did not pass on the issue; and the requirement of that state's appellate court was not to consider issues raised for the first time on appeal).

Petitioners have not made any effort to overcome the presumption that they did not timely raise their questions to the court below. Since the Virginia Supreme Court did not have jurisdiction to hear this matter, it follows that this Court does not have jurisdiction to hear this petition. *Ferguson*, 365 U.S. at 572; *Parker*, 333 U.S. at 574-575.

2. No Special Or Important Reasons Exist For Granting Certiorari

Rule 10 sets forth the considerations governing this Court's review of writs of certiorari. That Rule requires that a petition will be granted only when there are "special and important reasons" to do so. The Rule also sets forth several reasons that the Court will consider in granting certiorari. The only reason petitioners cite for this Court's favorable consideration of their petition is that:

> the Virginia court of last resort has decided an important question of federal law which has not been, but should be, settled by this Court.

See Petitioners' Petition for a Writ of Certiorari, p.16; Rule 10(c). Since the record does not support granting certiorari for this reason, this Court does not have jurisdiction to review this petition.

Specifically, the Virginia Court of last resort did not decide an important question of federal law. Although petitioners argue that the Virginia Supreme Court decided the questions they have presented, the record clearly demonstrates it did not. In fact, none of the Virginia courts in this matter reviewed, decided or even entered an order regarding petitioners' constitutional claims.

Furthermore this Court has sought to "be consistent in not granting the writ of certiorari except and in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties in cases where there is a real and embarrassing conflict of opinion and authority between the circuit

courts of appeal." *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

This case does not involve principles important to the public. Nor does it involves a conflict of opinion among the courts of appeals. Moreover, in light of the fact that none of the Virginia courts decided an important question of federal law, this Court must deny petitioners' petition for writ of certiorari for lack of jurisdiction or, alternatively, for absence of "special and important reasons". Rule 10.

3. Petitioners Possess No Cause of Action Constituting A Property Right

Entitlement to the protections of the Due Process Clause of the Fourteenth Amendment is predicated upon the deprivation of a property right by state action. Due process protections only extend to "existing" rights. *Alexander v. Beech Aircraft Corp.*, 952 F.2d 1215, 1225 (10th Cir. 1991) (where the court found that a cause of action that had not vested was not a property right entitled to the protections of the Fourteenth Amendment). *See also Texaco, Inc. v. Short*, 454 U.S. 516 (1982); *Silver v. Silver*, 280 U.S. 117, 122 (1929); *Atchafalaya Land Co. v. Williams Cypress Co.*, 258 U.S. 190 (1922); *Terry v. Anderson*, 95 U.S. 628 (1877); *Hess v. Snyder Hunt Corp.*, 240 Va. 49, 54 n.3, 392 S.E.2d 817, 821 n.3 (1990).

Property rights are created, and their dimensions defined, by state law. *Board of Regents v. Roth*, 408 U.S. 464, 577 (1972). Moreover, the deprivation of a property right must be caused by sufficient state action to warrant

the protections of the Due Process Clause. *Tulsa Professional Collection Services, Inc. v. Pope,* 485 U.S. 478 (1988).

The petitioners have argued that one of their property rights consists of causes of action in trespass and nuisance and since Va. Code §§8.01-230 and 8.01-243(b) extinguished their right to bring these causes of action, they are unconstitutional.[2] Petitioners' arguments are without merit.

First, Virginia law determines when and whether a Virginia citizen has a property right. *Roth,* 408 U.S. at 577. In this case, the Virginia legislature enacted a statute, the purpose of which, was to extinguish any right to bring a cause of action five years after the injury or breach occurred, regardless of whether the individual even had the right to bring the cause of action when the statutory period expired. Thus, the effect of the statute is that of a statute of repose. *Via v. General Elec. Co.,* 799 F.Supp. 837, 839 (W.D.Tenn. 1992). The Virginia Supreme Court has clearly held that statutes of repose that bar a cause of action before injuries are incurred do not violate due process or equal protection. *Hess,* 240 Va. at 52, 392 S.E.2d at 826.

Second, a cause of action is a species of property protected by the Due Process Clause only when there is an "existing" right to bring the cause of action. *Alexander,* 952 F.2d at 1255. The statutes in question required all

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[2] It is important to note that while the petitioners' brief alleges that both Va. Code §§8.01-230 and 8.01-243(b) violate the Due Process Clause, their questions presented only allege that §8.01-230 is unconstitutional. Thus, any questions relating to Va. Code §8.01-243(b) are not properly before this Court.

causes of action to be brought within five years after the injury or breach occurred. Va. Code §§8.01-230 and 8.01-243(b). Petitioners, initially alleged, and discovery confirmed, that the only breach of duty occurred in November, 1977. Thus, petitioners had until November, 1982 to file suit. However, petitioners did not file until March, 1991, almost nine years after the statute expired. Petitioners acknowledge that they could not have filed suit any earlier because they did not have an existing right to bring a cause of action. Thus, petitioners' causes of action were never entitled to the protections of the Due Process Clause. *Alexander*, 952 F.2d at 1225.

Moreover, all of the cases cited by the petitioners involved "existing" rights to bring a cause of action. Since, the petitioners admit that they did not have an existing right to bring a cause of action within the requisite five year period, these cases do not support petitioners' argument.

Finally, petitioners have asked this Court to declare Va. Code §8.01-230 unconstitutional on the basis that it extinguished petitioners' right to bring a cause of action they admit they never had. To do so would not only negate the intended effect of statutes of repose, but also be tantamount to conferring on petitioners a property right when the Virginia legislature chose not to do so. *General Elec.*, 799 F.Supp. at 840.

4. There Is Insufficient State Action to Afford Petitioners The Protection Of The Due Process Clause

Petitioners raise two due process arguments: that Virginia took their property without compensation and,

that the Virginia statute of limitations extinguished their right to bring a cause of action before they had the right to bring the cause of action. Because neither of these claims involve sufficient state action to afford petitioners the protection of the Due Process Clause, the petition should be denied.

First, petitioners actually allege that a private party, the respondent, took their property, and that Virginia allowed or acquiesced in respondent's actions. This Court has consistently upheld the principle that private actions merely allowed or acquiesced in by a state do not constitute state action for the purpose of the Fourteenth Amendment due process analysis. *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 164 (1978). A state will normally only be held responsible for private actions where the state has exercised coercive power and provided significant encouragement such that the private action involved is deemed to be that of the state's. *Blum v. William Yaretsky*, 457 U.S. 991, 1004 (1982).

It would be ridiculous to even suggest that there was sufficient state action in this case, because to do so would have required Virginia to coerce or encourage Exxon to release product from one of its underground storage tanks in November, 1977. Thus, any actions at the Exxon station which gave rise to the breach of duty in November, 1977, did not involve state action and did not violate the Due Process Clause of the Fourteenth Amendment.

Second, the only state action involving the statute of limitations is the Virginia legislature's passing of that statute. Since Virginia had no role to play beyond the mere enactment of the statute, the statute is considered to

be self-executing. While the mere enactment of a statute constitutes state action, this Court has repeatedly held that the enactment of self-executing statutes of limitations are not sufficient state action to trigger the protections of the Due Process Clause. *Tulsa,* 485 U.S. at 485. There being no such state action here, Va. Code §8.01-230 does not violate the Due Process Clause of the Fourteenth Amendment.

5. Virginia Code §8.01-230 Treats All Persons Similarly Situated Alike

The Equal Protection Clause of the Fourteenth Amendment essentially directs that all persons similarly situated be treated alike. *City of Cleburne, Texas v. Cleburne Living Center, Inc.,* 473 U.S. 432, 439-440 (1985). Equal protection requires that laws not only be equal on their face, but also in their application. *Mahone v. Addicks Utility Dist. of Harris County,* 836 F.2d 921, 932 (5th Cir. 1988). "If the challenged government action does not appear to classify or distinguish between two or more relevant persons or groups, then the action does not deny equal protection of the laws." *Id.* at 932.

The petitioners' equal protection argument is based on the belief that Va. Code §8.01-230 treats potential trespass and nuisance claims differently than other potential claims. The petitioners have failed to identify the basis of the unequal treatment other than to argue that the drafters of the statute did not intend to extinguish claims for trespass and nuisance prior to the time those claims vested.

On its face, Va. Code §8.01-230 does not classify or distinguish between potential claims. Thus, we must determine if the application of the statute to the petitioners' claim treats similarly situated persons alike.

The class of persons at issue includes anyone who has a potential cause of action for injury to person or property. There is no disparity in the application of Va. Code §8.01-230. It treats all potential causes of action for injury the same, in that all such causes of action can be extinguished prior to the time the right to bring the cause of action vests. Consequently, respondent maintains that the application of Va. Code §8.01-230 does not violate equal protection of the laws.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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(2)

No. 93-1515

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

DOROTHY E. MEGGERS, JAMES C. EWIN, and DOROTHY C. EWIN,

Petitioners,

v.

EXXON COMPANY U.S.A., WILLIAM A. PERDUE, CHEL GOLANSKY, and MARK I. HOLLAND,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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SUPREME COURT OF THE UNITED STATES

October Term 1993

No. 93-1515

DOROTHY E. MEGGERS, JAMES C. EWIN, and DOROTHY C. EWIN,

PETITIONERS,

v.

EXXON COMPANY U.S.A., WILLIAM A. PERDUE, CHEL GOLANSKY, and MARK I. HOLLAND,

RESPONDENTS.

On Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

Petitioners respectfully request this Court to grant their Petition For A Writ of Certiorari To The Supreme Court of Virginia to review the Court's holding that petitioners' causes of action for

common law trespass and nuisance are time barred under provisions of Virginia Code §§ 8.01-230 and 8.01-243(b). The suit filed on March 19, 1991, arose from the then presence of 5.5 inches of free floating gasoline found on petitioners' property and the then presence of additional underground gasoline contamination located uphill which had not yet entered petitioners' property.

The issues raised are of great constitutional significance, important to all property owners whose land is contaminated by underground gasoline originating from defective underground storage tanks owned and operated by big oil companies such as Exxon Corporation.

The issues raised by petitioners are typical of those affecting adjoining property owners at literally thousands of retail gasoline station sites. The harsh

ruling by the Virginia Supreme Court, reached without written findings concerning obvious factual disputes or reasoned analysis of difficult legal issues, affects the future rights of countless numbers of Virginia citizens.

The summary denial of both substantive and procedural due process to petitioners undermines public confidence in the fairness and integrity of the judicial system.

I. THE CONSTITUTIONAL ISSUES WERE TIMELY RAISED AND DECIDED BY THE TRIAL COURT

The Brief In Opposition of Exxon Company, U.S.A., argues that the Petition should be denied because federal constitutional issues were not properly raised before the trial court. Contrary to Exxon's assertions, the record is clear that in the trial court petitioners repeatedly asserted the unconstitutionality of the Virginia statute should it be interpreted as to time bar petitioners' claims. The issue was raised often during extensive pretrial proceedings before Judge Sheridan, who ruled that factual issues existed which could be resolved only by the jury on the issues of negligence, trespass, and estoppel, and by the trial court on the

nuisance issue.[1] Further, the record is crystal clear that the constitutional issues in question were indeed submitted and ruled upon by Judge Kendrick at the time of his entry of the final Order of Dismissal.

The applicability of Virginia Code §§ 8.01-230 and 8.01-243(b) to the issues of trespass and nuisance was argued at length before Judge Sheridan on December 10, 1992, in connection with Exxon's Demurrer seeking dismissal of plaintiffs' common law claims.

---

[1] The repeated statement by Exxon (Brief in Opposition at 2, 3 n.1, & 11) that petitioners never alleged, and that no evidence existed of, any breach of duty subsequent to November 1977 is obviously incorrect. See excerpts from petitioners' Motion For Judgment alleging continuous violations at Supplemental Appendix SA-1, 2; statements made by Exxon's counsel at SA-3; and proffer of evidence to Judge Sheridan at SA-3, 4, 12, 13, 14, 15, 16, 17.

On December 10, 1992, Judge Sheridan ruled on the trespass count: "The demurrer is overruled." Transcript at 12.

On the nuisance count, Judge Sheridan ruled:

> I think there's separate causes of action allowed to be pleaded in the alternative. At present, it is my intent to not have the jury decide nuisance; to let the judge decide nuisance and the jury decide other issues.
>
> But the demurrer to the nuisance count is overruled.

Id. at 17.

On January 13, 1993, Judge Sheridan again considered Exxon's arguments that plaintiffs' causes of action were time barred under Virginia law. The constitutionality of the statute was clearly addressed before Judge Sheridan, and plaintiffs' counsel specifically called to the Court's attention the concurring opinion of Justice Stephenson

in Keller v. Denny, 352 S.E.2d 327, 332 (Va. 1987). SA-6, 7.

At the hearing before Judge Sheridan on January 13, 1993, plaintiffs' counsel stated:

> MR. McDONALD: Good morning, Your Honor. We think it's crystal clear the plea in bar has to be denied for three separate reasons, not the least of which is the Virginia Supreme Court in their cases cited by the defendant has clearly rejected their interpretation of the accrual statute.
>
> And as indicated, if the accrual statute were to be interpreted so as to bar a cause of action before the injury had actually occurred, that it raises a serious constitutional question. But that is not an issue we think the Court has to reach.

Id. at 11.

Judge Sheridan ruled as follows:

> THE COURT: This is a difficult call. I'm denying the plea in bar without prejudice to any further fact finding on it, and putting the parties on

> notice that I may issue a written opinion on this.
>
> The written opinion may or may not overrule the plea in bar. It is a fascinating and to me a contradictory status as to what the statute is now in Virginia, and trial judges can read the various Supreme Court decisions and/or disagreements within the Supreme Court and recognize the law in Virginia may indeed be described as harsh, that the statute of limitations can run before you realize or can suffer your damage.
>
> I think Virginia law states exactly that, that it can happen. But the saying of, the reading of, the comprehension of it keeps me in somewhat of a pause. So I'll look at it further, but for the moment, I deny it.

Id. at 23.

The applicability of Va. Code § 8.01-230 and 8.01-243(b) was argued again before Judge Sheridan on February 4, 1993.

Counsel for plaintiffs argued to Judge Sheridan again at that time that a dismissal of plaintiffs' claims as time

barred would violate due process clauses of the state and federal Constitutions.

> MR. MCDONALD: Well, the Supreme Court of Virginia, there has never been a case that the Virginia Supreme Court has adopted this interpretation in a negligence case, and the Supreme Court has clearly indicated it would pose a serious constitutional question.

Id. at 19-20. Judge Sheridan then denied Exxon's Plea in Bar: "I'm going to leave my ruling on the statute of limitations where it's been." Id. at 24.

On March 9, 1992, just before a jury panel was to be selected, Judge Kendrick assumed the bench and asked for a proffer of evidence on the issue of equitable tolling of Virginia Code §§ 8.01-230 and

8.01-243(b).[2] Then, without making any finding of fact on the numerous factual issues, or making any analysis of the previous rulings of Judge Sheridan relating to plaintiffs' trespass and nuisance claims, Judge Kendrick orally dismissed plaintiffs' claims on the grounds they were all time barred. In a matter of minutes, Judge Kendrick orally reversed the months of painstaking pretrial proceedings.

Because plaintiffs' counsel had acted in reliance upon the earlier rulings by

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[2] Plaintiffs proffered a prima facia case that Exxon was equitably barred from asserting a limitations defense because of Exxon's fraudulent concealment of the known contamination moving eastward towards plaintiffs' property. Burnette v. New York Central R.R. Co., 380 U.S. 424, 427 n.2 (1965); Glus v. Brooklyn Eastern Dist. Terminal, 359 U.S. 231, 232 (1959). Judge Kendrick made no factual findings. The Virginia Supreme Court declined without explanation to review the issue. See SA-12, 13, 14, 15, 16, 17.

Judge Sheridan that unresolved factual issues were to be tried to the jury and the court, and because counsel had no prior notice of Judge Kendrick's intention to dismiss the entire case on the morning of trial for statute of limitations reasons, plaintiffs timely filed a written Motion For Reconsideration, which was heard by Judge Kendrick on April 30, 1993. The written brief accompanying the motion contained a separate section on constitutional issues that specifically cited the Fourteenth Amendment of the United States Constitution and its due process clause.

Also during the hearing on April 30, 1993, plaintiffs' counsel submitted to Judge Kendrick a proposed Order setting forth in writing the de facto ruling of the Court that the United States Constitution was not violated.

The proposed Order submitted to the trial judge during the hearing, stated in part:

> ORDERED that the application of Virginia Code § 8.01-230 and § 8.01-243 to bar plaintiffs' claims prior to the time of injury does not violate the due process and equal protection clauses of the Virginia Constitution and the Constitution of the United States;

Judge Kendrick declined to sign plaintiffs' proposed Order, signing instead the Order submitted by Exxon's counsel. The transcript of April 30, 1993 leaves no doubt that Judge Kendrick clearly considered and ruled upon the significant constitutional issues now before this Court. See Petition For Certiorari at 13-14.

II. VA. CODE §§ 8.01-230 AND 8.01-243(B) ARE UNCONSTITUTIONAL AS APPLIED

A.

Respondent's assertion that the petitioners have no rights under Virginia law is erroneous. Under the Virginia common law imported from England prior to our nation's birth, petitioners have property rights in fee which include the right to protect their property from pollution. Under the law as it has existed for hundreds of years, neither trespass nor nuisance remedies are available prior to the property actually being invaded.

In the instant case, the Court held that the statute of limitations ran even before any invasion took place. Since petitioners' trespass and nuisance causes of action were, according to the Court, totally repealed, petitioners are unable

to vindicate their rights. Petitioners clearly have been denied due process and are entitled to be before this Court. In barring petitioners' claims, Virginia law takes from petitioners and transfers to respondent a de facto easement to pollute petitioners' property.[3] Petitioners' vested property rights have been taken from them by the Commonwealth of Virginia without just compensation and transferred to Exxon.

B.

In arguing that the petitioners lacked any existing property right in its causes of action, respondent cites to dicta in Silver v. Silver, 280 U.S. 117, 122 (1929) which states that "the Constitution does not forbid the creation

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[3] Exxon's claims that the gasoline came from another source is inconsistent with evidence developed in discovery. SA-12, 13, 14, 15, 16, 17.

of new rights, or the abolition of old ones recognized by the common law." This argument is misplaced

This Court has never decided whether a state has the power to do away with the trespass and nuisance causes of action without violating the Fourteenth Amendment's Due Process Clause. Even if a state has such power, petitioners contend that this Court would not uphold the repeal of a trespass or nuisance cause of action without at least a statement from the legislature to justify such an action, or without any finding of a rational basis for such action. To repeal these ancient causes of action that are effectively the cornerstones of property rights embodied in our common law under the guise of a mere revision of procedure not intended to change substantive law, would be a classic case of failing to make law rationally

relate to a legitimate legislative objective. Zobel v. Williams, 457 U.S. 55 (1982).

Respondent tries to justify the statute in question by calling it a statute of repose. But, a substantial body of Virginia law defines a statute of repose as entirely different from the statute of limitations in question here. Hess v. Snyder Hunt Corp., 392 S.E.2d 817, 819 (Va. 1990); Commonwealth v. Owens-Corning Fiberglas Corp., 385 S.E.2d 865, 867 (Va. 1989).

While the Virginia Supreme Court has upheld a state statute of repose, Virginia Code § 8.01-250, it did so in the context of distinguishing this quite different statute of limitations, which bars a legal remedy, but is not designed to extinguish all future causes of actions from a date unrelated to the injury. Hess, 392 S.E.2d

at 819. The statute in issue here is not a statute of repose. See, Alexander v. Beech Aircraft Corp., 952 F.2d 1215, 1223 (10th Cir. 1991) (distinguishing statutes of limitations from statutes of repose).

C.

Respondent claims that for state action to exist, Virginia would have had to coerce or encourage Exxon to release gasoline from its underground gasoline tanks. But the gravamen of this case has nothing to do with accusing Virginia of involvement in the initial release of gasoline. Petitioners complain that Virginia bars petitioners from ever enforcing their property rights to keep respondent's gasoline off their property, or forcing respondent to remove the contamination Exxon caused.

D.

In arguing that no violation exists of the Equal Protection Clause of the Fourteenth Amendment, respondent urges that under Virginia Code § 8.01-230, the class of persons treated exactly alike includes anyone with a potential cause of action for injury to person or property. That is not correct. The law has not changed for injuries to person. In those cases, the cause of action does not begin to run until injury has been caused. But, the law has distinctly changed for property owners whose time for asserting causes of action in trespass and nuisance for injury to property expires before any damages occurs. Such persons, like petitioners, whose rights are cut off from filing suit, are those whose property is invaded and damaged by gasoline many years after an uphill spill from underground

gasoline storage tanks owned and operated by other parties.

CONCLUSION

For the reasons stated above and in the Petition For A Writ of Certiorari, this Court should grant the Petition.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

DOROTHY EWIN MEGGERS, et al., Plaintiffs, vs. EXXON CORPORATION, et al., Defendants.	At Law No. 91-329

MOTION FOR JUDGMENT

14. In a written report delivered to plaintiffs in mid-August 1990, Versar reported that testing in two test well sites located at the edge of North Washington Boulevard in front of 3435 disclosed the existence of gasoline and acetone in the groundwater. The two test wells are located across the street and downgrade from 3444 North Washington Boulevard, which has been operated as a gasoline station since approximately 1969.

* * *

COUNT II

(Trespass)

49. Defendants have caused and continue to cause petroleum, hazardous, and contaminated products to remain and migrate through the soil and groundwater onto and underneath plaintiffs' property at 3435 North Washington Boulevard.

* * *

COUNT III

(Nuisance)

53. Defendants' acts and omissions resulting in the discharge and migration of petroleum, hazardous, and contaminated products into the soil and groundwater beneath plaintiffs' property at 3435 North Washington Boulevard unreasonably interfered with, and continues to interfere with, plaintiffs' right to enjoy, hold, and alienate such property.

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

DOROTHY EWIN MEGGERS, et al., Plaintiffs, vs. EXXON CORPORATION, et al., Defendants.	At Law No. 91-329

Arlington, Virginia
Thursday, December 10, 1992

BEFORE:

THE HONORABLE PAUL F. SHERIDAN

MS. SNEE: . . . The defendant Exxon demurs because we want to know when the alleged trespass was by Exxon and is that continuous trespass by Exxon.

Tr. at 7.

MR. MCDONALD: . . . They took our expert's testimony yesterday. Our expert tells us from Versar that there is a plume

of pollution above the Wittstatt property which is borne out in the free-floating gas which is what we're talking about. It's not static. It moves some.

* * *

We allege gasoline we found in July of 1990 based on the limited ground water flow we had probably came on the property a couple of months before, and it is subject to rainfall, seasonal fluctuations in temperature.

But our expert will testify that the existing ground water each day, some of it moves on the property, some of it moves off the property and onto the Warner property.

Tr. at 9.

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

DOROTHY EWIN MEGGERS, et al.,	:	
Plaintiffs,	:	
vs.	:	At Law No. 91-329
EXXON CORPORATION, et al.,	:	
Defendants.	:	

Arlington, Virginia
Wednesday, January 13, 1993

BEFORE:

THE HONORABLE PAUL F. SHERIDAN

MR. McDONALD: Good morning, Your Honor. We think it's crystal clear the plea in bar has to be denied for three separate reasons, not the least of which is the Virginia Supreme Court in the cases cited by the defendant has clearly rejected their interpretation of the accrual statute.

And as indicated, if the accrual statute were to be interpreted so as to bar a cause of action before injury had actually occurred, that it raises a serious Constitutional question.

Tr. at 11.

* * *

Let me respond quickly to the intellectual question of how the Virginia Supreme Court interprets the accrual statute in question. I submit to Your Honor there are two dispositive cases, two recent Virginia Supreme Court cases which are cited in one of the footnotes, Robert Keller, III vs. Colin Devny [sic], III, decided by the Virginia Supreme Court on January 16, 1987.

They cite that in their footnote 3 for the proposition that in the concurring opinion, the Virginia Supreme Court in the concurring opinion stated it might very

well pose a serious constitutional question if you were to hold, which the Court did not do, that the statute of limitations would accrue and run before the injury occurred.

But that interpretation, at least in the concurring opinion, would raise serious constitutional questions. But the Court didn't need to reach that because the majority opinion recognized in Virginia as far as the interpretation of the accrual statute -- and that was a question of malpractice, attorney malpractice that occurred over a period of years[.]

Id. at 13, 14.

THE COURT: This is a difficult call. I'm denying the plea in bar without prejudice to any further fact finding on

it, and putting the parties on notice that I may issue a written opinion on this.

The written opinion may or may not overrule the plea in bar. It is a fascinating and to me a contradictory status as to what the statute is now in Virginia, and trial judges can read the various Supreme Court decisions and/or disagreements within the Supreme Court and recognize the law in Virginia may indeed be described as harsh, that the statute of limitations can run before you realize or can suffer your damage.

I think Virginia law states exactly that, that it can happen. But the saying of, the reading of, the comprehension of it keeps me in somewhat of a pause. So I'll look at it further, but for the moment, I deny it.

Id. at 23.

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

DOROTHY EWIN MEGGERS, et al., Plaintiffs,	:	
vs.	:	At Law No. 91-329
EXXON CORPORATION, et al., Defendants.	:	

Arlington, Virginia
Thursday, February 4, 1993

BEFORE:

THE HONORABLE PAUL F. SHERIDAN

THE COURT: Well, Harbo[u]rgate construed at 230 is pretty clear. That is hard for the plaintiff. I mean that is where I got in that debate before in this case is can the plaintiff lose a cause of action before they suffer the damage, and this seems to say yes.

MR. McDONALD: Well, the Supreme Court of Virginia, there has never been a case that the Virginia Supreme Court has adopted this interpretation in a negligence case, and the Supreme Court has clearly indicated it would pose a serious constitutional question. What I'm suggesting is that the meaning of -- you known, what duties did they owe, when did the breach occur, did it require injury, and can there be continuing breaches of duty are very complicated factual questions, and there is going to be considerable factual dispute at trial. So the Virginia Supreme Court's interpretation of this language of the breach of the duty owed or when did the cause of action arise. In order for you to have a cause of action in negligence, does the injury have to occur. And the fact that this is underground that has

taken place over a period of time, and that there was active concealment is going to pose a very difficult set of facts.

THE COURT: Well, I think that is why I virtually denied it with reservations.

* * *

THE COURT: [§§] 8.01-230 and 8.01-243(b) in Harbo[u]rgate make pretty clear the five-year statute applies, and the start of compensable damage is not required for the five-year situation to apply. But there are multiple reasons in this case that I would not enforce a statute of limitations defeat of plaintiff's claim at this time, and they include estoppel arguments.

Tr. at 18-20.

SA-12

EXXON RESEARCH AND ENGINEERING COMPANY

March 3, 1987

Analysis of Recovered Products from Location 2-8704
Arlington, Virginia

Ref. No. 87AN 163

Mr. Dan Nieser
Exxon Company, U.S.A.
3600 East West Highway
Hyattsville, MD 20782

Dear Dan:

We have completed the Analysis of the recovered product samples from location 2-8704 Arlington, Virginia. The samples (well-1 and well-4) were collected by Handex Corporation and delivered to us for product identification analysis.

Gas chromatographic (GC) analysis found both well-1 and well-2 product samples to be weathered gasolines, in that a portion of the lower boiling components were no longer present. GC analysis for Exxon's proprietary additives HTA and XCL-12 detected HTA in product sample well-1. No HTA or XCL-12 was detected in product sample well-4; however, HTA and XCL-12 can decompose under certain soil conditions. Comparison of the GC chromatograms of the 5% bottoms analysis (Figures 1 and 2) shows differences in the two well samples.

Lead content by x-ray fluorescence found 0.74 grams per gallon lead in well-1 and 0.033 grams per gallon lead in well-4.

These data indicate the product in well-1 is weathered, leaded Exxon gasoline. The product in well-4 appears to be weathered, unleaded gasoline. The two product samples appear to be from different sources.

We plan no further work on these samples. If we can be of further assistance please let us know.

Sincerely,

s/s Norwood
N. Harris

03038702.NH

Att.

SA-14

EXXON COMPANY, U.S.A.

December 1, 1987
Various Exxon Sites
Northern Virginia

Ms. Jan Pickrel
Virginia Water Control Board
5515 Cherokee Avenue
Suite 404
Alexandria, Virginia 22312

Dear Jan:

Per your request at our meeting on November 13, 1987, I am providing the following:

EXXON R/S NO.	ADDRESS	ENCLOSED
Former 2-8704	3444 North Washington Arlington, Va.	Gauge Reports Well Map/ Boring Logs

* * *

As we discussed at our meeting, Exxon will continue to bail and gauge the wells at 2-8704.

As you may recall, 2-8704 is now a Texaco station and I asked you how long Exxon will be required to continue monitoring this site, since no one can be sure who is responsible for the product in the monitoring wells. Please let me know your thoughts on this issue.

* * *

Thank you for your continued help.

Highest Regards,

/s/ Gregory T. Hodgdon

GTH/mfj
064D/1287

Enclosure

cc: R.W. Dennis
L.W. Lindeen
D.J. Nieser (Washington, D.C. District Office)

(Emphasis added.)

Excerpts from independent environmental study conducted for Exxon by EA Engineering, Science, and Technology, Inc., dated March 31, 1987, state as follows:

At the time of the divestment [December 1986], EXXON removed the existing steel product tanks; according to Mr. Al Perdue, the present Texaco operator and former EXXON operator, the tanks were approximately 20 years old when removed. At that time, Mr. Perdue noticed several small "bullet-holes" in the tanks. A strong gasoline odor was also noted, along with a sheen on the water remaining in the excavated tank pit. Subsequent excavation work was conducted at the site and small fire occurred when a backhoe hit a rock.

* * *

. . . Examination of the data indicates the presence of significant concentrations of gasoline vapors in the vicinity of VP-8

(the area between the north pump island and the former pump island). Floating product was observed in monitoring well #3 (MW-3); headspace analysis indicate[s] significant concentrations of gasoline vapors are present in the remaining three wells.

* * *

. . . As noted in Section 2, the former EXXON tanks were noticeably damaged, and the likelihood of EXXON product loss is very great.

* * *

The primary hazard of concern is the migration of gasoline vapors to sanitary sewer lines located in the immediate vicinity. A second hazard of concern appears to be the possible contamination of the groundwater.